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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 12-12020-mg; Adv. Case No. 14-01926-mg
- - - - -x
In the Matters of:
RESIDENTIAL CAPITAL, LLC, et al.,
Debtors.
- - - - -x
RESIDENTIAL FUNDING COMPANY, L.L.C.
Plaintiff,
-against-
UBS REAL ESTATE SECURITIES, INC.,
Defendant.
- - - - -x
United States Bankruptcy Court
One Bowling Green
New York, New York

June 26, 2014
10:03 AM

B E F O R E:
HON. MARTIN GLENN
U.S. BANKRUPTCY JUDGE

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(Doc #7095) Motion of the ResCap Liquidating Trust for an Order
Authorizing Release of Adequate Assurance Deposit Filed by
Joseph A. Shifer on Behalf of ResCap Liquidating Trust.

(Doc #7036) Motion for Order Estimating Claims and Establishing
Disputed Claims Reserve.

(Doc No. 6863, CC: Doc. No. 7054) Adjourned Motion for Relief
from Stay Filed by Jorge Cerron.

Adv. Proc. No. 14-01926-mg: (CC: Doc. Nos. 5, 6, 7, 18)
Motion to Remand Filed by Skadden Arps.

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ALSO PRESENT:

TODD SILVER, Party Pro Se

JORGE CERRON, Party Pro Se (TELEPHONICALLY)

OTIS COLLIER, JR., Party Pro Se (TELEPHONICALLY)

RONALD ERIKSEN, Party Pro Se (TELEPHONICALLY)

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CORLA JACKSON, Party Pro Se (TELEPHONICALLY)
DEANNA HORST, Chief Claims Officer, ResCap Liquidating
Trust (TELEPHONICALLY)

1 P R O C E E D I N G S

2 THE COURT: All right. Please be seated.

3 We're here in Residential Capital 12-12020, and we'll
4 also deal with at least one adversary proceeding. But let's
5 proceed with the agenda.

6 MR. SHIFER: Good morning, Your Honor. Joseph Shifer
7 with Kramer Levin for the ResCap Liquidating Trust.

8 THE COURT: Good morning.

9 MR. SHIFER: The first matter going forward is on page
10 7 of the agenda. Now, that's the motion of the ResCap
11 Liquidating Trust for a release of the adequate assurance
12 deposit.

13 Your Honor, this motion was filed at docket number
14 7095. It seeks a release of the adequate assurance deposit
15 that was created by the ResCap -- by the debtors at the time in
16 connection with Section 366 of the Bankruptcy Code to provide
17 an adequate assurance deposit for the utility companies at the
18 time.

19 Your Honor, as we state in the motion, with the
20 effectiveness of the plan, the liquidating trust no longer
21 receives services from any of the utility companies, and we ask
22 that it be released. The original order provided that the
23 liquidating trust may terminate some of the utility companies.
24 It wasn't clear whether or not the entire deposit can be
25 released. So out of an abundance of caution, we filed a

1 motion. It was served on all of the original utility
2 providers, and we did not receive a response.

3 We submitted the declaration of Deanna Horst, the
4 chief claims officer for the ResCap Liquidating Trust, and
5 she's on the phone if Your Honor has any questions. And having
6 no opposition, formal or informal, we ask that the motion be
7 entered.

8 THE COURT: All right. Does anybody wish to be heard
9 with respect to the liquidating trust's motion to release funds
10 being held in a segregated account as adequate assurance for
11 utility providers?

12 All right. The motion is ECF docket 7095. The trust
13 motion is supported by the declaration of Deanna Horst.
14 Through the motion, the trust seeks an order permitting to
15 release 566,959 dollars held in the account. The trust asserts
16 that when the account was established it had twenty-nine
17 utility providers, but now has only one. Moreover, the trust
18 does not owe any sums to utility companies for post-petition
19 services, and there's only one pending utilities claim
20 regarding pre-petition services for \$1,254.36 filed by Waste
21 Management.

22 The trust asserts that the lone utility provider is
23 adequately assured payment on post-confirmation obligations
24 considering the significant size of the disputed claims reserve
25 and the operation of the confirmed plan. The utility provider

1 faces no real risk of nonpayment. And the funds from the
2 utilities account could -- it can be released and distributed
3 to other credits.

4 The motion is unopposed. The motion is granted.

5 MR. SHIFER: Thank you, Your Honor.

6 The next item on the agenda is a contested matter.
7 It's the borrowers trust's motion for an order to establish a
8 disputed claims reserve, and I'll cede the podium to counsel
9 for the borrowers trust.

10 THE COURT: Thank you.

11 MR. FLANIGAN: Good morning, Your Honor. Dan
12 Flanigan, Polsinelli law firm, for the borrower claims trust
13 with respect to this motion.

14 And Your Honor, the motion is supported by the
15 declaration of Michael J. Talarico, which is attached as
16 Exhibit B.

17 THE COURT: Before you proceed, let me get the
18 appearances of those in the court or on the phone who are
19 objecting to the motion.

20 Does anyone in the court -- come on up, and you need
21 to identify yourself. And then, you can have a seat up front.

22 MR. SILVER: Good morning, Todd Silver. I'm a
23 claimant. I filed an objection to this motion.

24 THE COURT: Sure.

25 All right. Why don't you have a seat, Mr. Silver?

1 MR. SILVER: Thank you.

2 THE COURT: Anybody on the phone who is appearing in
3 opposition to the borrower trust motion for estimating claims
4 and establishing a disputed claim reserve?

5 MR. COLLIER: Yeah.

6 THE COURT: And tell me your name.

7 MR. COLLIER: Otis Collier.

8 THE COURT: Say that again.

9 MR. COLLIER: My -- docket number 71 -- I'm sorry,
10 Judge, or Your Honor.

11 THE COURT: Tell me your name.

12 MR. COLLIER: Docket -- pardon? Only my name?

13 THE COURT: Yes, your name.

14 MR. COLLIER: My name is Otis Collier.

15 THE COURT: I'm sorry, your last name is what?

16 MR. COLLIER: Collier, C-O-L-L-I-E-R.

17 THE COURT: Okay. We'll come to you. I just want to
18 make sure I get the appearances.

19 Anyone else appearing in opposition? Anyone else on
20 the phone?

21 MR. CERRON: Yes. My name is Jorge Cerron, but I'm
22 appearing for my motion to request relief from the status.
23 That different, I guess.

24 THE COURT: Yes, yes. All right. Now, I'm just
25 asking for those on the phone who are appearing in opposition

1 to the motion to establish their claim reserve.

2 MR. ERIKSEN: Yes, Your Honor. Ronald Eriksen.

3 THE COURT: Okay, Mr. Eriksen.

4 Anybody else?

5 All right. Mr. Flanigan, go ahead.

6 MR. FLANIGAN: Thank you, Your Honor. Dan Flanigan,
7 borrower claims trust.

8 Your Honor, we hope we've been able to show what we
9 believe we've done, which is approach this in the most careful
10 and conservative possible way. We've analyzed it in three
11 different ways, making ultraconservative but rational
12 assumptions in each case. And by rational, I mean that we
13 don't assume the claims estimation version of an asteroid
14 hitting the earth that we're within some reasonable possibility
15 of historical claims experience and what it shows us.

16 In scenario one --

17 THE COURT: Well, let me -- let's stop for a minute,
18 okay? I'm looking in my notes. Okay. How many borrower
19 claims remain unresolved?

20 MR. FLANIGAN: 592.

21 THE COURT: I thought it was 597, but --

22 MR. FLANIGAN: You're right, Your Honor, 597.

23 THE COURT: 597 borrower claims remain unresolved.

24 And as I understand it, 131 of those claims meet the criteria
25 for the borrower convenience class claims.

1 MR. FLANIGAN: Yes, Your Honor.

2 THE COURT: And tell me, under the borrower
3 convenience class, how much is going to be paid?

4 MR. FLANIGAN: We don't know, Your Honor, because we
5 have to first understand whether they're allowed claims or not.

6 THE COURT: Okay. So what's the cap on convenience
7 class claims?

8 MR. FLANIGAN: Individually or --

9 THE COURT: Individually.

10 MR. FLANIGAN: -- in some kind of aggregate? I have
11 to --

12 THE COURT: Individually.

13 MR. FLANIGAN: Pardon me. I always have to look that
14 up.

15 THE COURT: Okay.

16 MR. FLANIGAN: I'm sorry, Your Honor. I have to look
17 it up.

18 THE COURT: That's okay.

19 (Pause)

20 MR. FLANIGAN: With regard to GMACM, Your Honor, it's
21 an amount equal to less than 8,500 dollars. And at RFC, it's
22 with an asserted amount or filed amount equal to or less than
23 28,000 dollars.

24 THE COURT: Okay. Can you tell me, in the aggregate,
25 if all of the 131 convenience class borrower claims were

1 allowed in the full amount, how much that would be?

2 MR. FLANIGAN: I think we can compute that quickly if
3 we don't know the answer.

4 THE COURT: Could you, please?

5 MR. FLANIGAN: Yes.

6 Your Honor, the allowed amount of all of those 131
7 claims would be 400,000, and the total amount paid out would be
8 150,000 dollars in distributions.

9 THE COURT: All right. And am I correct -- well, let
10 me ask you this question. Under the confirmed plan, what is
11 the maximum percent that borrowers can recover on allowed
12 claims?

13 MR. FLANIGAN: There is not a maximum percentage, Your
14 Honor. We have a fund, and then we'll divide the ultimate
15 allowed claims into that fund. And the percentage could
16 be -- it's projected to be a minimum of thirty percent of the
17 case of GMAC and nine percent in the case of RFC, which were
18 the plan comparable percentages. But we already have a
19 significant cushion there and would -- that would indicate
20 higher percentage distributions than that. And we expect them
21 to be higher than that, but we don't know exactly what they are.

22 THE COURT: All right. So hypothetically, it's
23 possible that, depending on the pool of allowed borrower
24 claims, borrowers could recover sixty percent on a claim,
25 hypothetically.

1 MR. FLANIGAN: Hypothetically.

2 THE COURT: Okay. So based on --

3 MR. FLANIGAN: Well, I should say it would be awfully
4 hard for the RFC people who start at nine to get that high.

5 THE COURT: Right.

6 MR. FLANIGAN: But GMAC --

7 THE COURT: Okay.

8 MR. FLANIGAN: -- starting at thirty, theoretically --

9 THE COURT: So --

10 MR. FLANIGAN: -- could --

11 THE COURT: -- based on the claims that have been
12 settled or allowed to date, what is the -- can you tell me what
13 the amount of allowed borrower claims is for GMAC and RFC?

14 MR. FLANIGAN: I don't have them separately. I could
15 give you those, but I do have them totally.

16 THE COURT: Okay.

17 MR. FLANIGAN: Only seventy-eight individual, not
18 including cla -- and we're dealing with all individual claims
19 now -- only seventy-eight individual claims have been allowed.

20 THE COURT: For how much? That includes claims that
21 have been settled, because you --

22 MR. FLANIGAN: Yes.

23 THE COURT: -- the trust has settled -- how
24 many -- well, tell me what's the total amount for the seventy-
25 eight that have been allowed.

1 MR. FLANIGAN: 2,150,000 dollars. I don't know if
2 this number's helpful, Your Honor. That represe -- 2,400
3 claims have been resolved. So of the 2,400 claims, three
4 percent, 78 claims have been allowed. And there's only 592
5 (sic) left.

6 THE COURT: How many of the seventy-eight --

7 MR. FLANIGAN: 597.

8 THE COURT: -- allowed claims have been resolved by
9 settlement?

10 MR. FLANIGAN: We don't know that answer, Your Honor,
11 but --

12 THE COURT: You don't know the answer? I mean,
13 the -- it -- the trust is the one that's settling the claims.

14 MR. FLANIGAN: All of them have been allowed by
15 settlement.

16 THE COURT: So we start with 597 borrower claims that
17 remain unresolved. 131 of them are convenience class claims,
18 which you say the maximum amount is 400,000 dollars. So that
19 leaves 466 borrower claims that need to be resolved. Is my
20 math correct?

21 MR. FLANIGAN: Your math is correct, Your Honor.
22 However, I would say that even the convenience claims have to
23 be resolved.

24 THE COURT: I'm -- but let's -- we're talking about a
25 claim reserve, and so in the context of this case, even if they

1 were allowed in full, you're telling me that there are only
2 400,000 dollars in the convenience class.

3 MR. FLANIGAN: Yeah, it's not material, Your Honor.

4 THE COURT: That's not the material number.

5 MR. FLANIGAN: Right.

6 THE COURT: So there are 466 borrower claims, by your
7 reckoning. There are appeals from some of the decisions I
8 rendered expunging claims. But at least, at the bankruptcy
9 court stage, there are 466 borrower claims remaining to be
10 resolved, correct?

11 MR. FLANIGAN: That's correct, Your Honor.

12 THE COURT: Okay. So Mr. Flanigan, the biggest
13 problem I have is that -- let me quote from virtually every
14 prospectus for a mutual fund or others that I've had is the
15 following language. "Past performance is no assurance of
16 future results." And so the question I have is the methodology
17 that FTI followed in scenarios one, two and three was based
18 solely on predicting future results from past performance and
19 not on an evaluation of the 466 borrower claims that remain to
20 be dealt with, correct?

21 MR. FLANIGAN: That is correct.

22 THE COURT: Okay. Do you have any case support for
23 the methodology that FTI applied? Because what you're doing is
24 asking me to estimate claims. To estimate the claims, I need
25 to estimate the 466 borrower claims that are unresolved. Do

1 you have any case authority that supports the Court applying
2 the methodology that FTI used to evaluate 466 claims based on
3 what's happened with the other borrower claims that have been
4 resolved?

5 MR. FLANIGAN: No, Your Honor. The methodology needs
6 to stand on its own as persuasive or not.

7 THE COURT: Well, so let --

8 MR. FLANIGAN: We think, regardless of the mutual fund
9 prospectus statement, that it is, in fact, dependable in this
10 situation, that it's literally overwhelming.

11 THE COURT: You think so?

12 MR. FLANIGAN: I absolutely believe that. We --

13 THE COURT: You think that --

14 MR. FLANIGAN: -- we really wouldn't --

15 THE COURT: You think if I were to retain a court
16 expert, that they would support the methodology that FTI has
17 applied to estimate the value of claims that you are not
18 looking at at all in asking me to estimate a claims reserve?
19 Are you serious?

20 MR. FLANIGAN: Your Honor, I believe that when you
21 look at the overwhelming evidence that FTI has gathered here,
22 and the fact that the post-petition experience has been even
23 stronger than the pre-petition experience, that the true-up
24 analysis that they did back in connection with plan
25 confirmation has shown to be even more liberal, if you will, as

1 the cushion that we had on that has increased to fifteen
2 million dollars from eight million dollars just in those few
3 months.

4 THE COURT: So one of the things, Mr. Flanigan -- I'm
5 pretty sure I've commented on this from the bench during
6 omnibus claims objections. Maybe I didn't use this term. But
7 it seems to me that the debtors, before confirmation, and the
8 trust since, have gone after the low hanging fruit. And you
9 acknowledge in your papers that what remains are the most
10 contentious -- to accept the trust's argument -- probably
11 inflated borrower claims that remain to be -- those are the
12 ones that remain.

13 I think I've commented that the claim objections have
14 gotten harder for the Court over the last few months than they
15 were in -- I've resolved -- there are a handful that are
16 awaiting decision. But I think I've commented they've gotten
17 harder. And I think it's a fair statement to say that the
18 debtor and the trust have gone after the low-hanging fruit, and
19 I don't fault them for doing that.

20 MR. FLANIGAN: Your Honor, may I point out a --

21 THE COURT: Please.

22 MR. FLANIGAN: -- couple things on that?

23 THE COURT: Go ahead.

24 MR. FLANIGAN: First of all, just because they're
25 harder doesn't mean that they're more valid or more likely to

1 be --

2 THE COURT: I --

3 MR. FLANIGAN: -- allowed.

4 THE COURT: -- fully agree with that.

5 MR. FLANIGAN: In terms of this cherry-picking or low-
6 hanging fruit, the debtor resolved all twelve of the class
7 claims which were very, very hard and handled hundreds or
8 thousands of borrower claims, effectively, in doing so.

9 Number two, nine claims in excess of seven million
10 dollars each have been resolved. By the way, only a 45,000-
11 dollar payment in all of those claims. Over 700 claims that
12 had asserted amounts in excess of a million dollars have been
13 expunged. I think that provides some counterargument to
14 whether it's been low-hanging fruit or cherry-picking.

15 And Your Honor, may I point out one other thing. In
16 terms of the low-hanging fruit left, Your Honor pointed out the
17 130-plus convenience claims, there are 300 remaining claims
18 under 100,000 dollars, including the convenience claims.

19 THE COURT: So why don't you file objections to the
20 ones that seek a hundred million and let me deal with them,
21 and -- because you're not talking about -- see, of the 466
22 borrower claims not in the convenience classes, how many of
23 those are you saying involve relatively small amounts
24 of -- small dollars?

25 MR. FLANIGAN: Roughly 170 more, on top of the

1 convenience claims.

2 THE COURT: And you say --

3 MR. FLANIGAN: That are less than 100,000.

4 THE COURT: So we're down to 360 -- well, we're down
5 to 290 claims or something that you say are over 100,000
6 dollars. Do you have the exact number that are over 100,000
7 that remain to be resolved?

8 MR. FLANIGAN: 297.

9 (Pause)

10 THE COURT: So the circuit authority that I find tells
11 me -- and this is a Fifth Circuit case, Brints Cotton
12 Marketing, Inc., 737 F.2d 1338, 1341. So when estimating
13 claims, a court must apply "the legal rules which govern the
14 ultimate value of the claim." And ordinarily it involves state
15 law.

16 To apply the legal rules which govern the ultimate
17 value of the claims, I have to look at the claims. I have
18 had -- not very many, but I have had estimation proceedings.
19 Usually the parties have worked it out. But when I've had an
20 estimation trial, it's not a full-blown trial on the merits,
21 but the purpose is to estimate what the value of the claims
22 are. Because if I set the reserve and it turns out to be
23 inadequate, those at the end of the queue are left holding the
24 bag, because they only get a percentage of what's left.

25 And it may be that the total amount that is available

1 is high, and there's no way in the world that the borrower
2 claims are going to get allowed in those amounts. But let me
3 ask you this --

4 MR. FLANIGAN: Your Honor, may I interrupt?

5 THE COURT: Go ahead.

6 MR. FLANIGAN: Mr. Wishnew has some interesting
7 information about the largest borrower claims, that if he could
8 step to the podium --

9 THE COURT: No, not yet.

10 MR. FLANIGAN: -- my --

11 THE COURT: Not yet.

12 So what concerns me, Mr. Flanigan, is one home run,
13 and while perhaps unlikely to occur, could ravage your model.

14 MR. FLANIGAN: Your Honor, I'm not sure how you define
15 a home run. But as shown in Exhibit A to our reply, there
16 could be five -- let me put it in context. The largest payment
17 on any individual borrower claim pre-petition was 400-and-some
18 thousand dollars. The largest post-petition is 325,000
19 dollars.

20 We showed there, that if five borrower claims came in
21 at a million dollars each, there's still plenty of room. And
22 you could continue extending that analysis. So --

23 THE COURT: Past performance is --

24 MR. FLANIGAN: -- home runs can be hit --

25 THE COURT: -- no -- and past performance is no

1 assurance of future results. You haven't shown
2 anything -- because you don't look -- you're not estimating the
3 value of the remaining claims. We've now worked it down to
4 where you say there's 297 claims over 100,000 dollars. Some of
5 them have -- seek 100 million. Whether those have any validity
6 or not, I'm not going to say. Okay?

7 But how long is it going -- how long would it take you
8 to file objections to the 297 claims that week over 100,000
9 dollars?

10 MR. FLANIGAN: As Your Honor, I think, knows, we're
11 working with the now Liquidating Trust people. The claims
12 people have always worked with the debtors. And they have a
13 whole schedule of how to --

14 THE COURT: Well, if I tell you that I want you to
15 reorder your priorities, and at the earliest possible date, I
16 want whatever objections the debtor is going to file to the 297
17 claims seeking over 100,000 dollars, how long will it take you
18 to do that? Consult with anybody you want.

19 (Pause)

20 MR. FLANIGAN: At least until the end of the year,
21 Your Honor.

22 Your Honor, let --

23 THE COURT: Go ahead, Mr. Flanigan.

24 MR. FLANIGAN: I want to try something.

25 THE COURT: You're going to have to try something

1 else, because you're not convincing me.

2 MR. FLANIGAN: It is an unusual estimation, and it's
3 for the purpose of establishing the reserve, as opposed to this
4 particular person is stuck with this estimation. We have this
5 cumulative feature that's going to allow someone to benefit
6 from all the claims that -- remember a three percent allowance
7 rate, turn it around, a ninety-seven percent success rate in
8 terms of expungements. So --

9 THE COURT: And you've got a couple of home runs
10 against you, and it's going to change these numbers. And
11 that's what -- when you don't focus on the remaining claims,
12 when you don't focus on the 297 claims seeking over 100,000
13 dollars, you've -- you haven't estimated the claims. You're
14 using past performance to try and estimate future results.
15 Okay?

16 Mr. Flanigan, one of two things is going to happen
17 here, okay, because I am highly doubtful about FTI's
18 methodology. And those who've objected are for the most part
19 pro se borrowers. And I'm not anxious to do this, but the
20 Court has the authority under Federal Rule of Evidence 706 to
21 appoint an expert.

22 And according to the Manual for Complex
23 Litigation -- the Annotated Manual for Complex Litigation,
24 Fourth Edition: "Judges sometimes appoint an expert to render
25 assistance other than testifying at trial, such as analyzing

1 and evaluating reports prepared by the parties' experts or
2 attorneys. In such situations, ex parte communications
3 regarding matters of substance may be necessary, but should be
4 subjected to procedural safeguards." And it goes on to
5 describe the procedural safeguards.

6 I am not satisfied with the -- I know just enough
7 statistics to be dangerous. Okay. And so I'm not an expert.
8 But the methodology that FTI has applied is flawed. It may
9 well turn out to be conservative for -- it may well turn out to
10 be too generous to the remaining claims. And that may likely
11 be true. But that's not the issue for me. The issue for me is
12 do I have a reliable model for estimating remaining borrower
13 claims that is not at all based on an analysis of any of those
14 claims. Okay?

15 And my concern is that any respectable expert is going
16 to say, Judge, you can't rely on it.

17 So I'm going to mull this over. I'm not going to
18 grant your motion today. I mean, I'll tell you that right now.
19 I'm not saying that every one of the 297 remaining claims
20 seeking over 100,000 dollars has to be resolved before I
21 estimate a claims reserve. If you had come to me with even a
22 single case that supported the methodology that FTI has
23 applied, I'd be more impressed with your motion.

24 I'm reluctant to add to the expense in this case to
25 retain an expert to assist the Court, not to do its own

1 analysis, but to review the FTI report. I just don't think
2 it's methodologically sound.

3 I don't want the borrowers who've had claims allowed
4 to have to wait indefinitely to recover. I mean, it's -- every
5 borrower ought to understand that if they want to see the
6 dollars sooner rather than later, it's to their advantage to
7 have a claim reserve established so that the trust can start
8 paying out borrower claims.

9 So, you say there are only seventy-eight claims that
10 have been allowed so far in the amount of 2,150,000 dollars.
11 Those people are waiting. I mean, they would -- if I granted
12 this motion, you could start paying out on those claims. And
13 now you can't.

14 So I'm really mindful of the borrowers. Yes, and you
15 pointed out that the largest number of borrower claims were
16 resolved through the class actions that have already been
17 approved -- settlements that have already been approved.

18 So I'm unhappy. Okay. Not -- this isn't so much
19 directed at you. But I don't think you've given me what the
20 law requires for me to be able to estimate claims. Do you want
21 me to retain an expert to review the report of FTI?

22 MR. FLANIGAN: Probably not, Your Honor. And, Your
23 Honor, I hope Your Honor appreciates that we're very aware that
24 this might have been a result of our motion -- your reaction to
25 it. But we might as well not estimate. If we have to do that,

1 we might as well just object and litigate the claims.

2 Otherwise, we're effectively doing it twice.

3 So before we spend more, before we get another expert
4 involved, we'd like to sort of caucus, regroup a little bit and
5 just make sure that makes sense. Because an expert that just
6 came in and agreed with you --

7 THE COURT: Well, agreed with me --

8 MR. FLANIGAN: -- what's the point?

9 THE COURT: What -- I need an evidentiary basis that
10 would support setting the reserve in the amount you've
11 requested. And my concern is that the FTI methodology is
12 flawed and can't support a sustainable finding by the Court
13 that the amount of the reserve you're seeking is appropriate.
14 I would like to be able to set a disputed claims reserve. I
15 would like to speed distributions to borrower claimants. Okay.
16 You're trying to accomplish that; that's good.

17 Let me hear -- I want to hear from any of the
18 objectors, people who filed objections.

19 I apologize; your name, again?

20 MR. SILVER: Todd Silver.

21 THE COURT: Yeah, Mr. Silver, come on up. You don't
22 have to speak, but I want to give anybody who filed an
23 objection a chance to --

24 UNIDENTIFIED SPEAKER: I filed an objection.

25 THE COURT: -- address -- let me -- I've got somebody

1 in the courtroom, and then I'll turn to the phone.

2 Go ahead, Mr. Silver.

3 UNIDENTIFIED SPEAKER: I filed an objection --

4 MR. SILVER: I think you hit everything on the head
5 that I was going to say.

6 UNIDENTIFIED SPEAKER: I filed an objection --

7 MR. SILVER: I just wanted to add --

8 THE COURT: Hang on. Hold on. Okay. Whoever's on
9 the phone, stop talking. I'll give you a chance, okay? Mr.
10 Silver, one of the borrower claimants, is in court, and I'm
11 going to hear him first.

12 Go ahead, Mr. Silver.

13 MR. SILVER: I think you echoed most of the things
14 that I wanted to say. Also, as far as just their wording of
15 it, it seems to me like they were picking -- cherry picking.
16 And they were using 2,400 people that were easily resolved, to
17 try to further something along and throw these 597 remaining
18 people into a category. And I just think that it's fair that
19 everybody that took the time to file a claim -- and I
20 understand there are some wildly and absurd. I had a lady who
21 read my objection, called me from California, and she said she
22 had a 250-million-dollar claim. And I was, like, oh, these are
23 the people on my side, or in the same category as me; I kind of
24 thought I was in trouble right off the ruff.

25 But my point is, is that every person who did the

1 diligence to file this claim deserves the same integrity to be
2 looked at. They shouldn't be categorized. There shouldn't be
3 a computer system to generate. And before anything can move
4 forward with those other claimants, I think it's only fair that
5 everybody has to be on the same level. And I guess that's
6 where I disagree.

7 THE COURT: Let -- look, Mr. Silver, I'm not -- and
8 I'm going to let you speak some more, but so you submitted an
9 objection; it's at ECF 7143. You filed one proof of claim in
10 the amount of 30,616 dollars against GMACM. And you later
11 supplemented your claim to allege 231,120 dollars in liability.
12 And that's at your objection at page 2. And the trust has not
13 yet objected to your claim.

14 I'm not urging you to back off -- the -- even
15 accepting your claim that the 230,000-dollar amount, it's
16 almost inconceivable to me that you wouldn't be protected if
17 your claim was allowed in full. Okay.

18 MR. SILVER: And I guess that's where I was a little
19 misreading the document. But at the end of the day, when I was
20 reading it -- and I'm not an attorney, and I apologize --

21 THE COURT: I under --

22 MR. SILVER: -- in the document --

23 THE COURT: No, don't apologize.

24 MR. SILVER: -- if I wrote it the wrong way.

25 THE COURT: Don't apologize.

1 MR. SILVER: But to me, even if it does help me, it
2 doesn't help the rest of 596 people.

3 THE COURT: Well, we're --

4 MR. SILVER: And I just think --

5 THE COURT: We're sort of down to the 297, because --

6 MR. SILVER: Okay.

7 THE COURT: -- if any claim under 100,000
8 dollars -- yours is over; 231- --

9 MR. SILVER: Right.

10 THE COURT: You amended it. But if any of the claims
11 under 100,000 were allowed, there'd still be plenty of money
12 there. Okay?

13 MR. SILVER: The other --

14 THE COURT: So your -- even your claim, 231,000, I
15 have no idea whether your claim ought to be allowed or not;
16 that's not before me today. But so if your claim were allowed
17 today, you'd be sitting, maybe until the end of the year,
18 before you got a dollar.

19 MR. SILVER: And I honestly can say that I would be
20 happy with that and fine with that as long as everybody else
21 gets their fair share.

22 THE COURT: Okay.

23 MR. SILVER: I've watched what this bank did to people
24 in the foreclosure court. I was lucky enough to have my
25 foreclosure dismissed. I watched what it did. And if I have

1 to suffer or take a little bit less so other people get their
2 fair shot, I'm more than welcome to do that.

3 THE COURT: My -- look, my role is to -- I've got to
4 decide these issues. I don't favor -- whatever anybody might
5 think, I don't -- I don't believe I favor the debtor or trust,
6 versus a borrower. Where a borrower claim should be expunged,
7 I do that, but I do it on the merits, okay? I have no idea
8 what the merits of your claim are. In due course, that'll
9 either -- it'll either be allowed or reduced or expunged.
10 So --

11 MR. SILVER: I just have a pending case that was on
12 file prior --

13 THE COURT: Lots of people did --

14 MR. SILVER: -- back in 2012, right.

15 THE COURT: -- okay?

16 MR. SILVER: That's the only thing I have for --

17 THE COURT: Okay.

18 MR. SILVER: -- evidence right now.

19 THE COURT: Okay.

20 MR. SILVER: I mean, I'm being blocked from validating
21 my claims with the stay. Meanwhile, GMAC was allowed to sell
22 the mortgage to Ocwen, who's coming after me --

23 THE COURT: No, they didn't sell --

24 MR. SILVER: Okay.

25 THE COURT: I want -- this is something I want to be

1 clear about. Excuse me for interrupting.

2 MR. SILVER: Sure.

3 THE COURT: GMAC sold servicing rights --

4 MR. SILVER: Okay.

5 THE COURT: -- to the mortgages; it didn't sell
6 mortgages. And there are -- I stop you there because there are
7 some other objections, and I've had this come up before. I
8 don't fault you for thinking that. But what Ocwen purchased
9 was the right to service your loan. I don't know who owns your
10 loan, okay? I have no idea --

11 MR. SILVER: Okay.

12 THE COURT: -- who owns your loan.

13 MR. SILVER: EverBank, it's a new bank; I just got an
14 e-mail.

15 THE COURT: Okay.

16 MR. SILVER: But -- okay.

17 THE COURT: What Ocwen acquired were the servicing
18 rights.

19 MR. SILVER: Okay.

20 THE COURT: Whether Ocwen's trying to foreclose, I
21 have no idea, okay? I have no control over it. Ocwen is the
22 loan servicer. But I just -- it may not be all that important,
23 in the bigger scheme of things for you, but they didn't sell
24 your loan. They didn't own your loan and they didn't sell your
25 loan.

1 MR. SILVER: Well, the new servicer is now coming
2 after me for an absurd amount of money on a note that's being
3 contested that I can't even claim is contested because it can't
4 be validated because it's held up in a stay in my federal case.
5 I'm contesting the note in the dollar amount, and that case is
6 stayed.

7 THE COURT: Oh, if Ocwen -- look, I'm not going to
8 give you legal advice --

9 MR. SILVER: That was my --

10 THE COURT: -- but if --

11 MR. SILVER: That was my next question.

12 THE COURT: If Ocwen -- further, even if GMAC had
13 sought to foreclose, there was an order entered in this case,
14 quite early on, the supplemental servicing order --

15 MR. SILVER: Right.

16 THE COURT: -- that permitted you to assert any
17 defense; if you thought there was an invalid note or mortgage,
18 you could -- and GMAC were trying to foreclose, you could have
19 asserted it. Ocwen, you can assert anything you want. Look,
20 I -- when I say anything you want, anything --

21 MR. SILVER: Right.

22 THE COURT: -- that there's --

23 MR. SILVER: So that --

24 THE COURT: -- some legal validity.

25 MR. SILVER: -- that order is for the new servicer as

1 well?

2 THE COURT: No. Your -- I don't control what Ocwen
3 does, okay?

4 MR. SILVER: Okay.

5 THE COURT: What got entered early in this case,
6 because GMAC was -- I don't know if it was true in your
7 case -- they were proceeding with foreclosures, and people --
8 borrowers, well, what could we do? Well, you could assert
9 any -- you couldn't get an affirmative dollar recovery, but you
10 could assert, as an affirmative defense, whatever defenses you
11 thought you had. I don't want to get caught up in that. I
12 can't give you --

13 MR. SILVER: Right.

14 THE COURT: -- legal advice about it.

15 MR. SILVER: I understand what you're saying, I think.
16 I thank you for saying it.

17 THE COURT: But I think what the trust is trying to
18 accomplish is having the ability to start paying claims that
19 are allowed soon. Okay. That's good, okay? Assuring that
20 there's a big enough claim reserve is what has to happen before
21 they can start doing that, okay?

22 I want to make clear I'm not saying all 297 claims
23 over 100,000 dollars have to get resolved before that can
24 happen. But I need to have -- I need to be persuaded that a
25 supportable methodology has been applied in determining the

1 amount of the proposed claim reserve. So I mean, I -- look,
2 I've read your objection. I understand you're not a lawyer.

3 MR. SILVER: Okay.

4 THE COURT: I take your objection seriously. You
5 heard my comments before --

6 MR. SILVER: I feel part of that was --

7 THE COURT: -- to Mr. Flanigan.

8 MR. SILVER: -- kind of preemptive and has to be
9 waited to see if there's an objection filed to my claims before
10 I can say that part.

11 THE COURT: I understand. Anything else you want to
12 add?

13 MR. SILVER: No, I've just got to stay with the fact
14 that how they wrote their motion, categorizing the 597 in the
15 one category, call them all absurd; I took offense, and that's
16 why -- you know, part of the reason of the objection.

17 THE COURT: And they didn't call all -- well let
18 me -- in fairness, I -- yeah, I remember what they said about
19 absurd. They applied that to some a hundred million plus
20 claims. Whether they're absurd or not, I don't -- I'm not
21 getting into that, but --

22 MR. SILVER: The only thing, I just -- I think
23 everybody's claims should be handled with the same diligence
24 and handled the same way --

25 THE COURT: Okay.

1 MR. SILVER: -- before any of those other claims can
2 move forward. I don't think it's fair that people are
3 different levels along in this bankruptcy.

4 THE COURT: All right.

5 MR. SILVER: But that's all.

6 THE COURT: Thank you very much.

7 MR. SILVER: Thank you for your time. Am I free to
8 go?

9 THE COURT: Absolutely.

10 MR. SILVER: All right. Thank you.

11 THE COURT: You can say or go. You are excused if you
12 wish to be.

13 MR. SILVER: I don't have a train until 5:30 so maybe
14 I'll stick around --

15 THE COURT: Okay.

16 MR. SILVER: -- and take notes.

17 THE COURT: All right. Thanks.

18 All right. Are there any other borrower objections on
19 the phone? Well, first off, anybody else in the courtroom?

20 I don't see anybody coming in the courtroom.

21 MS. LANZETTA: I --

22 THE COURT: You're -- yes, come on up. There's one
23 more in the courtroom.

24 Is there anybody else in the courtroom who filed an
25 objection? Okay.

1 Why don't you come up and identify your name, okay?

2 MS. JACKSON: Your Honor --

3 MS. LANZETTA: Good morning, Your Honor.

4 THE COURT: Hold on, on the phone, hold on. I want
5 to -- I will come to you on the phone.

6 Go ahead.

7 MS. LANZETTA: Good morning, Your Honor. My name is
8 Donna Lanzetta. I'm an attorney. I have a personal claim and
9 also represent two other claimants. I did not file an
10 objection. I called Mr. Flanigan and said I was ill and asked
11 for a week extension to put my objection in and I was denied
12 the courtesy of a --

13 THE COURT: Let's just deal with --

14 MS. LANZETTA: -- one-week extension.

15 THE COURT: Why don't you tell me what your argument
16 is? Tell me, who are the other two people you represent?

17 MS. LANZETTA: It's my mother.

18 THE COURT: Her name is?

19 MS. LANZETTA: Jean (ph.) Lanzetta.

20 THE COURT: Okay.

21 MS. LANZETTA: And my deceased father, the estate of
22 Dominique Lanzetta. It --

23 THE COURT: And did you file proofs of claim on behalf
24 of yourself and them as well?

25 MS. LANZETTA: Yes, claim number 4423, 4420, and 4405.

1 THE COURT: Okay.

2 MS. LANZETTA: Each claim, Your Honor, is in the
3 amount of 2.25 million dollars. I feel this is very
4 reasonable. We are within the 297 claims remaining over
5 100,000 dollars.

6 I just wanted to -- it was uplifting to hear the
7 Court's comments regarding past performance and how that is no
8 gauge of future results. I think that it's obviously flawed,
9 the numbers that they have here. There are some claimants
10 here -- I believe we are some of them -- that have suffered
11 some significant damages. This fraud that the bank has done
12 has destroyed my family.

13 THE COURT: Tell me this.

14 MS. LANZETTA: We --

15 THE COURT: What's the nature -- do all three of the
16 claims that you've referred to arise out of the same set of
17 facts?

18 MS. LANZETTA: Yes, all three -- we were all three
19 named defendants in a foreclosure action, and --

20 THE COURT: Same property? One property?

21 MS. LANZETTA: On one property that we jointly owned.

22 THE COURT: Where was the property?

23 MS. LANZETTA: The property is out in East Quogue in
24 Suffolk County.

25 THE COURT: Okay.

1 MS. LANZETTA: We were -- there's a lot of background
2 about the fraud that went pre-litigation, but in the process of
3 the litigation, there were fraudulent documents filed with the
4 court.

5 THE COURT: May I ask you this? Has the house been
6 foreclosed on?

7 MS. LANZETTA: The house has not been --

8 THE COURT: Okay.

9 MS. LANZETTA: -- foreclosed on.

10 THE COURT: Okay.

11 MS. LANZETTA: We are -- the matter is still pending.

12 THE COURT: May I ask you this as well? Who owns the
13 loan?

14 MS. LANZETTA: I have no idea.

15 THE COURT: Do you get a monthly statement?

16 MS. LANZETTA: I see something from Ocwen now as a
17 servicer --

18 THE COURT: It's the loan servicer, right.

19 MS. LANZETTA: My -- the mortgage was in the mortgage
20 electronic recording system, the biggest fraud of our lifetime,
21 according to the New York State Attorney General.

22 THE COURT: Do you know whether it's -- whether the
23 loan is owned by a securitization trust? You don't know?

24 MS. LANZETTA: I don't know.

25 THE COURT: Okay.

1 MS. LANZETTA: I know that I myself was hospitalized
2 five times since the stress of this foreclosure. All we wanted
3 to do was modify our mortgage.

4 THE COURT: Okay.

5 MS. LANZETTA: My father had a stroke and died. There
6 are people who have claims that are valid. And I think that
7 this cramdown is unsupported by the calculations of FTI.

8 THE COURT: Is there a pending foreclosure action?

9 MS. LANZETTA: Yes.

10 THE COURT: By Ocwen?

11 MS. LANZETTA: No, it's by RMS -- some trust.

12 THE COURT: Okay, then a trust owns the loan; I'm
13 assuming that. But -- and what's the status of the foreclosure
14 action?

15 MS. LANZETTA: The status was there was a motion for
16 summary judgment, which was denied; that was over a year ago.

17 THE COURT: Okay, anything else you want to tell me
18 now?

19 MS. LANZETTA: No. I thank you for taking my
20 comments. I appreciate -- I believe that there's no legal
21 basis for the analysis and the reserve that the movants are
22 proposing.

23 THE COURT: Okay, thank you, Ms. Lanzetta.

24 MS. LANZETTA: Thank you.

25 THE COURT: All right, first, is there anybody else in

1 the courtroom who wants to be heard on their objection?

2 All right, now let me --

3 Wait. One more in the courtroom.

4 Come on up.

5 Okay, other than the gentleman who's coming up, is

6 there anybody else in the courtroom who wants to be heard with

7 respect to an objection?

8 All right, your name is?

9 MR. QUIROZ: Yes, Your Honor. First of all, I would
10 like to --

11 THE COURT: Tell me -- I'm sorry; tell me your name
12 again.

13 MR. QUIROZ: Yeah, my name Ramon Quiroz. I have a
14 case pending --

15 THE COURT: Can you spell your last name? I
16 apologize.

17 MR. QUIROZ: I'm sorry?

18 THE COURT: Spell your last name.

19 MR. QUIROZ: Q-U-I-R-O, Z as in zebra. Quiroz.

20 THE COURT: Okay. Go ahead, Mr. Quiroz.

21 MR. QUIROZ: Our case in actually Second Circuit,
22 which was -- actually had summary-judgment reversal. And the
23 court actually -- after my property was foreclosed for the
24 fourth time, they dismissed my case; they denied. And today
25 I'm in Supreme Court because I'm filing an appeal. But I

1 actually want to solve this and I want to explain to you
2 exactly what happened.

3 THE COURT: How much is your claim -- did you file a
4 claim in the bankruptcy?

5 MR. QUIROZ: I did file a claim --

6 THE COURT: For --

7 MR. QUIROZ: -- for 522,000 dollars; yes.

8 THE COURT: 522,000?

9 MR. QUIROZ: Yes.

10 THE COURT: Okay, go ahead.

11 MR. QUIROZ: I would like actually to speak a little
12 more, but I am not capable of speaking very good English --

13 THE COURT: Okay.

14 MR. QUIROZ: -- so I bring my interpreter. Is it
15 possible that he could come --

16 THE COURT: Sure.

17 MR. QUIROZ: -- and talk for me?

18 THE COURT: Yes. What is your native language? What
19 is your native language, first-spoken language? Spanish.
20 Okay.

21 MR. QUIROZ: David Gonzalez --

22 THE COURT: Okay.

23 THE INTERPRETER: My name's David Gonzalez. I'm here
24 with Mr. Quiroz.

25 THE COURT: Okay, go ahead.

1 (Statement of Mr. Quiroz translated through the
2 interpreter)

3 THE INTERPRETER: What he's trying to say is they've
4 attempted to foreclose on four occasions; they haven't been
5 able to. He's afraid that it's been done fraudulently. And I
6 believe he had a case but it was -- he's trying to lift the
7 stay.

8 MR. QUIROZ: Yeah, lift the stay, yeah.

9 THE INTERPRETER: That's what --

10 THE COURT: That's on the docket.

11 THE INTERPRETER: Okay, it's on the docket, so --

12 THE COURT: Okay. I haven't ruled on that yet. Go
13 ahead. Okay.

14 Let me -- one quick -- is there currently pending a
15 foreclosure action?

16 THE INTERPRETER: I believe so.

17 THE COURT: Ask him.

18 MR. QUIROZ: Yes.

19 THE COURT: Where?

20 THE INTERPRETER: I believe it's --

21 MR. QUIROZ: Ocwen Loan, you know, sent someone to --

22 THE COURT: Okay. All right. Thank you.

23 THE INTERPRETER: Okay.

24 THE COURT: Okay, let me hear -- on the phone, does
25 anybody wish to be heard?

1 MR. ROZIER: Oh. Hello?

2 THE COURT: Yes, go ahead.

3 MS. JACKSON: Corla Jackson.

4 MR. ROZIER: Your Honor, this is David Rozier. Can I
5 (sic) hear me -- can you hear me?

6 THE COURT: Yes, I can hear you.

7 MR. ROZIER: Yes, sir. My name is David Rozier. I'm
8 representing Karen Rozier. We are in California. We are the
9 second largest claim against GMAC in this situation.

10 THE COURT: Mr. Rozier, are you a lawyer?

11 MR. ROZIER: No, sir, I'm not.

12 THE COURT: All right, ordinarily I would only hear
13 from a lawyer representing someone, but I'll let you go ahead
14 and -- well, I want to make sure, though; I'm happy to listen
15 to you, Mr. Rozier, but I'm not going to listen to Karen Rozier
16 separately. One or the other of you, I'm happy to hear from.

17 MR. ROZIER: Okay, sir.

18 THE COURT: Okay?

19 MR. ROZIER: Yeah, I'm calling for Karen Rozier, sir.
20 I'm sorry.

21 THE COURT: Go ahead.

22 MR. ROZIER: I'm --

23 THE COURT: Yes. All right, go ahead.

24 MR. ROZIER: I'm not familiar with the procedures.
25 Ours is the second largest claim that everyone's

1 concerned about, for the hundred million dollars against GMAC,
2 and we are the only claim, out of all the claims, that is
3 unopposed. The reason for that is a story. GMAC has been so
4 foul in what they've done, committing fraud upon the Court,
5 that it's reprehensible what they have done. In our situation
6 specifically, we were forced into foreclosure or default by
7 them. We were paying our mortgage. And this is why our
8 numbers are so large. The house that they're concerned about,
9 I built it with my own two hands; it's 4,000 square feet and
10 it's worth 1.355 million dollars. You can Zillow that and look
11 at it. It's very -- it's common knowledge right there.
12 Everybody in the country knows this.

13 The problem is that when I was in Mexico, I was in the
14 middle of my twenty-four-million-dollar deal down there
15 developing properties, thanks to NASA, doing quite a bit of
16 work. They forced us into foreclosure by telling us that they
17 would not -- they sent our payment back. We were paying our
18 mortgage; they sent it back to us. We asked what was the
19 problem, what's going on. After they sent the mortgage back,
20 we called them. They told us they would not talk to us for
21 three months until we were in default. We sent the payment and
22 forced it into the system; we got it registered in the system,
23 and then they took it out and sent it back again. This is all
24 documented.

25 After they forced us into foreclosure, we started

1 talking to them. My wife had discovered that there was a
2 problem with LIBOR, two years before all this blew up, and that
3 the fact is that in the year '27 the whole thing fell apart.
4 It made no sense. Now, the statistical experts and the people
5 who understand finance, as Karen does, realized that
6 their -- the whole thing was a fraud and that the numbers never
7 worked out.

8 So even if you modified your loan or changed it or
9 whatever, the numbers just don't jive. The reason that she
10 knows is because she qualified in statistics, economics and
11 finance at Harvard University. She's a Harvard University MPP
12 graduate from the Kennedy School. She also has a Ph.D. (ABD)
13 at the Kennedy School. She is one of the only people in the
14 country -- she's the first black female admitted to the school.

15 Again, they ruined my twenty-four-million-dollar deal
16 by forcing us into foreclosure, having us fight this entire
17 fight for the last six years. We have not been able to work.
18 We have not been able to do anything. I've lost more family
19 members than I can count anymore. And they're continuing this
20 harassment by passing it on from originally GMAC, the whole ETS
21 nonsense, some amount of complaint against MERS. And the whole
22 thing with MERS is, which MERS? Because they purposely tried
23 to confuse the situation by having MERS built different ways.

24 After they tried to cloud the issue with MERS, they
25 then sold it to a series of other banks after it'd been

1 collateralized: LaSalle (ph.) Bank, eventually Bank of
2 America, U.S. Bank. And now Ocwen is trying to foreclose on my
3 home. They said in court that they're not trying to foreclose,
4 and at this point the statute of limitations had run out to
5 collect any money. However, I'm still in court twice a week,
6 every week, here in Santa Ana, fighting these people, appealing
7 to the appeals court in the Ninth Circuit, trying to get
8 resolution, because no one has done what they were supposed to
9 do legally yet. The lawyers are all running around getting
10 paid while the claimants are all getting screwed.

11 Now, the expert that you have, this Taralico (sic) or
12 whatever, in our complaint, we've outlined exactly why he's not
13 qualified to be an expert. This man has no experience on the
14 level that we're talking about. And as our claim outlined, it
15 shows specifically why our claim is valid. We've broken it
16 down, each and every bit of it, to why you owe us this money.

17 We all came to an agreement. The agreement
18 was -- several times the claimants, we've already agreed to an
19 amount to be paid out. They started paying. They paid the
20 ETS-MERS portion of it. That is basically a contract claim.

21 You're right; the reason ours is unopposed is because
22 they cannot oppose it. What they did was so criminal to us --

23 THE COURT: Well, Mr. Rozier --

24 MR. ROZIER: -- that it --

25 THE COURT: Mr. Rozier?

1 MR. ROZIER: -- it's obvious.

2 THE COURT: Mr. Rozier, stop. Okay.

3 MR. ROZIER: Yes, sir.

4 THE COURT: Karen Rozier has, on several occasions,
5 made the argument, which the Court has rejected, that her claim
6 is allowed. The time for the trust to object to claims has not
7 yet run. Okay --

8 MR. ROZIER: Sir, I would agree --

9 THE COURT: So I --

10 MR. ROZIER: -- with that except for a couple --

11 THE COURT: So don't tell me that she has an allowed
12 claim. I've already determined she does not have an allowed
13 claim. Let me summarize. Karen Michele Rozier has filed
14 claims 4738 and 5632; one of the claims seeks nearly a hundred
15 million dollars.

16 MR. ROZIER: That's correct.

17 THE COURT: The claim object -- the objection to this
18 motion has argued that the trust expert is not qualified. I've
19 addressed my own concerns. It goes on. I've read the
20 objection carefully. I don't believe that it proposes an
21 appropriate methodology for estimating the claim reserve. It
22 challenges the methodology that was applied by FTI; I've
23 already indicated my comments about that.

24 So now is not the time to deal with the merits of
25 Ms. Rozier's claim, other than to say I have on multiple

1 occasions rejected the argument that she has an allowed claim
2 in the amount of a hundred million dollars. The time for the
3 trust to object to her claim has not yet run. I'll deal with
4 her claim --

5 MR. ROZIER: Exactly.

6 THE COURT: -- if and when the trust files an
7 objection within the time provided.

8 All right. Anybody else on the phone wish to be heard
9 with respect --

10 MS. JACKSON: Corla Reed Jackson.

11 THE COURT: Okay, tell me who you are.

12 MS. JACKSON: Corla Reed Jackson.

13 THE COURT: Nice to hear from you again, Ms. Jackson.

14 MS. JACKSON: Hi, Judge. Good morning to you. How
15 are you doing?

16 THE COURT: All right, go ahead, Ms. Jackson.

17 MS. JACKSON: I like what you said about he wasn't an
18 expert who estimates these claims and damages that Residential
19 Capital and GMAC Mortgage Corporation has done and this theory.
20 I think that's the best thing you've ever said since I've been
21 coming up there and since I've been on this phone.

22 And I personally feel that GMAC Mortgage has committed
23 fraud of (sic) the court that's under you, and I can back it
24 with the evidence and will send that. And for some reason
25 you've not been getting the proper documents to support what

1 are my claims and what I've said.

2 This is what led to an appeal. This led to an appeal
3 because of the fraud of (sic) the court that GMAC Mortgage and
4 their affiliates have been scheming to do prior to and after
5 they filed bankruptcy. Okay? They robbed me after they filed
6 bankruptcy. I was not, and I am not, a creditor of GMAC
7 Mortgage; I never have been and I never will be. Because of
8 what transpired with me and them trying to force me to say I've
9 had a loan with them, I don't want to do no business with
10 nobody like that ever, Your Honor.

11 Now, I filed an appeal because there was no experts
12 over my cases. I know you appointed an expert over my case,
13 but there was no expert over the cases who determined the
14 damages that GMAC Mortgage has caused me. They have caused me
15 to lose everything I own. They took my name off of my property
16 illegally to make it appear as if I had a loan with them, when
17 I did not. And because the proper procedures was not done
18 or --

19 THE COURT: Ms. --

20 MS. JACKSON: -- someone didn't do their job right,
21 and based upon fraud of (sic) the court, it led to illegal
22 force.

23 THE COURT: Ms. Jackson? Ms. Jackson, the only thing
24 pending before me today is a motion to establish a claim
25 reserve.

1 MS. JACKSON: Okay.

2 THE COURT: Ms. Jackson filed claim number 4443
3 against GMACM, asserting a claim in the amount of a hundred
4 million dollars as a general unsecured claim. Ms. Jackson's
5 claim was expunged by the Court on January 27th, 2014; see ECF
6 docket number 6363. She has since appealed the Court's order
7 to the United States District Court for the Southern District
8 of New York and her appeal is pending before Judge John Koeltl
9 in the district court; it's case number 14-02427.

10 Ms. Jackson is no stranger to this Court; her most
11 recent filing, like all of her previous filings in this case,
12 repeats verbatim portions of her previous stay-relief motions
13 and responses to the debtors' objections to her proof of claim.

14 Rather than addressing the merits of the current
15 motion, Ms. Jackson again repeats her contentions that GMACM
16 does not own her mortgage or note, that GMACM is violating
17 orders issued by the bankruptcy court in Alabama, and that
18 GMACM is violating orders issued by this Court, and that Ms.
19 Jackson's ejectment action should be stayed. She maintains
20 that any action taken by GMACM to collect the debt on her
21 property is a fraud on the Court. All these arguments have
22 been made previously and have been addressed by me in multiple
23 denials of her request to lift the automatic stay and the
24 Court's order expunging her claim.

25 The Jackson objection that I have before me today

1 merely attached copies of sections of other cases, many from
2 outside this jurisdiction, and are pleadings -- and pleadings
3 from her own bankruptcy cases. I've addressed those arguments
4 in the prior rulings that the Court rendered. This is a
5 current appeal pending in the United States District Court for
6 the Southern District of New York.

7 Anyone else on the phone wish to be heard with respect
8 to objections to set the amount of the estimated claim reserve?

9 MR. ERIKSEN: Yes, Your Honor. Ron Eriksen.

10 THE COURT: Go ahead, Mr. Eriksen.

11 MR. ERIKSEN: Thank you, Your Honor. My position is
12 that the debtor had made it impossible to (break in audio) to
13 me through the plan and that in consideration of my not
14 contesting the plan, I have made an agreement with them and
15 they have promised to pay -- New York, a promise to pay
16 constitutes an agreement. My contention is that they are
17 looking to renegotiate the agreement that they've already made
18 with me.

19 And further, extremely respectfully, it's my position
20 that the Court does not have the jurisdiction at this time to
21 alter the plan that the Court has already ordered. My claim is
22 about a million dollars; it is a 500,000-dollar home. I have
23 had negotiations for settlement, and I believe those
24 negotiations were done in bad faith. Under Illinois (sic),
25 those negotiations are allowed as part of testimony in court;

1 and I think it would give Your Honor an insight into the
2 thinking of the debtor if I might have thirty seconds to
3 describe those.

4 THE COURT: Go ahead.

5 MR. ERIKSEN: Originally they -- I filed my claim as
6 secured; they contested that and they won. They came back and
7 alerted me of that at the Court's direction. I said, well, I
8 would like to settle. Jonathan -- I believe the last name's
9 Platt -- said to me, I don't think I -- I know you're -- I
10 (sic) said I don't think I can get you the value of your home.

11 THE COURT: Mr. Eriksen --

12 MR. ERIKSEN: And I said, okay --

13 THE COURT: Mr. Eriksen.

14 MR. ERIKSEN: Yes.

15 THE COURT: I'm only interrupting because I don't get
16 involved in the settlement negotiations. So I don't want to
17 know what you demanded and what they may have offered, okay?

18 MR. ERIKSEN: Yes, Your Honor.

19 THE COURT: Because I may ultimately have to decide
20 disputed issues of fact and law, I don't want to know what the
21 settlement -- I don't have a problem about you telling me
22 you've had settlement discussions with them. I encourage
23 settlement discussions. I don't want to know the particulars
24 of what you've demanded and what they've offered, okay?
25 That's --

1 MR. ERIKSEN: Yes, Your Honor.

2 THE COURT: That's why I interrupted you. Go ahead.

3 MR. ERIKSEN: Thank you, Your Honor. And that's why
4 I'd asked for permission. Thank you for clarifying.

5 The short of it is I don't believe that their
6 intention is to quickly pay out the people that have already
7 become deserving of money; I believe it is to increase their
8 negotiating position with the people that they have yet to
9 object to. This is an end run around the plan that they've
10 already agreed to, and allowing to do that will save them time
11 and money in court but will deprive myself of my day in court
12 because when they start to negotiate with me, the first thing
13 that they're going to say is, well, even if you win, all you're
14 going to be able to get is X. I've already agreed to take
15 thirty cents on the dollar if I win, but I won't agree -- or
16 I'm contesting that they'll be -- their proposition that I
17 might take two or three cents on the dollar even if I win.

18 THE COURT: Okay. So, Mr. -- Ronald and Julie Eriksen
19 filed claims 5573 and 5580. After an objection from the
20 debtor, the Court ordered that their claims be redesignated and
21 reclassified; the order is at ECF 6332. Their claims remain
22 pending. The redesignating is identifying the debtor against
23 which the claims properly lie.

24 Mr. Eriksen argues that they're not disputed claims
25 because the trust did not object to the merits of the claim by

1 the effective date. But as I've held numerous times, the
2 deadline for the trust to file objections to the claims has not
3 yet run. I think it's sometime in September. It can be
4 extended, but it's currently a date in September. So the
5 deadline for the trust -- and I've ruled on this numerous times
6 now -- the deadline for the trust to object to claims has not
7 yet run.

8 Mr. Eriksen, you'll get your opportunity -- assuming
9 that the -- assuming you don't resolve your claim with the
10 trust, which I encourage to keep trying to do, at some point in
11 time the claim objection -- if there's an objection to the
12 specific claim, it'll come before me, and you'll get your day
13 in court. Nobody's denying your day in court. I appreciate --

14 MR. ERIKSEN: Yes, Your Honor.

15 THE COURT: -- your concern and your -- look, you've
16 heard me already express my concern that I don't have an
17 adequate basis on which to approve the specific claim reserve
18 that's been asked for. It is to everybody's advantage that the
19 Court set a claim reserve so that people can start getting
20 their money, but I just don't have it yet. But I appreciate
21 hearing from you.

22 MR. ERIKSEN: One brief clarification, please, Your
23 Honor?

24 THE COURT: Go ahead.

25 MR. ERIKSEN: It's not my contention that I

1 have -- that I'm automatically allowed it. That's not what I'm
2 asserting at this point. Your Honor's correct, obviously, that
3 they haven't filed an objection. But my comment is, by them
4 establishing a further reserve, it's a renegotiation of the
5 plan and I would not have an opportunity to object to that the
6 same way I would have an opportunity to object to the plan.
7 And I don't think that that is their -- that that is their
8 legal prerogative to do and, respectfully, I don't think it's
9 within the Court's jurisdiction to change the plan that the
10 Court has already ordered.

11 THE COURT: Okay. Is there anybody else on the phone
12 who wishes to be heard with respect to objections to the
13 estimation motion?

14 MR. COLLIER: Yes, sir.

15 THE COURT: Go ahead.

16 MR. ERIKSEN: I agree with the last guy, is all.

17 THE COURT: Go ahead. Who's that?

18 MR. COLLIER: Yeah. My name is Otis Collier.

19 THE COURT: Okay. Go ahead.

20 MR. COLLIER: Yes, sir. I'm in Houston, Texas.

21 THE COURT: Okay.

22 MR. COLLIER: And my objection to the claim is simple.
23 I applied for a modified mortgage, of which I was only
24 \$6,368.36 behind. But my wife was unemployed at the time and
25 I'm disabled, and I thought that the modification would

1 possibly save me the trouble of trying to catch up on three to
2 four mortgages that I was behind. I was granted -- I applied
3 for the modification; I was granted the modification in March
4 of 2010. I did -- I did six months of payment. And
5 the -- GMAC sent me a mortgage, which they -- which I did not
6 receive for two months. I contacted them about why they didn't
7 have -- it was returned to them undeliverable as addressed.

8 To make it short, they sent me another mortgage; I
9 refused the mortgage simply because it -- at the time it still
10 would not have helped me. And I told them that I would go to
11 the VA or go to the -- to HUD for -- and reapply for a
12 mortgage. Two weeks later, before I could do anything, they
13 called me and told me that they had worked out a modification
14 that I could live with. Again, this -- by this time it
15 was -- this was early January of 2011. Again, I sat and I
16 waited for a mortgage that never showed.

17 And I just want to read one thing into the record if
18 at all possible --

19 THE COURT: Go ahead, Mr. Collier.

20 MR. COLLIER: Yes, sir.

21 THE COURT: Go ahead.

22 MR. COLLIER: -- which is an admission, on their part,
23 of negligence. And it reads that GMACM received an updated
24 financial-analysis package on March 22nd, 2011 subsequent to
25 the previous loan modification review, that GMAC began to

1 review accounts in Texas to determine that the mortgage was
2 originated as an extension of credit, as defined in Section
3 50(a)(6), Article XVI of the Texas Constitution, that this
4 mortgage loan was originated under this section. GMAC was
5 unable to offer a loan modification.

6 In other words, sir, for 6,000 dollars, which I could
7 have gone into a loan store and borrowed, I am -- they are
8 taking my house of twenty-five years because they failed to
9 originally notify me in March of 2010 that they were not able
10 to offer me a modification. Therefore, I'm seeking -- my
11 damages are over 100,000 dollars, and I am seeking -- and they
12 are attempting to foreclose on my home. They are -- as soon as
13 they received this analysis, I started receiving foreclosure
14 notices again because the money is not sufficient enough to
15 cover the arrearage that I have -- that I have accumulated
16 since December of 2010. And all of this is simply because of
17 the fact that they did not do due diligence as far as Texas law
18 is concerned. And I don't feel that I should lose my home for
19 6,000 dollars.

20 THE COURT: Thank you, Mr. Collier.

21 Mr. Collier filed claim 5066 against GMACM --

22 MR. COLLIER: Yes, sir.

23 THE COURT: -- asserting a general unsecured claim in
24 the amount of 118,115 dollars and a secured claim in the amount
25 of 243,885 dollars. The basis of the claim appears to relate

1 to mortgage modification. His claim remains pending.

2 Mr. Collier, in his written objection before me,
3 doesn't substantively address the motion that's before me now.
4 He attaches to his papers a delinquency notice from Ocwen
5 explaining that Mr. Collier is 1,460 days delinquent in his
6 mortgage loan and that his account has been referred to an
7 attorney to foreclosure.

8 Mr. Wishnew or Mr. Flanigan, I would appreciate it
9 if -- let me --

10 Mr. Collier, do you have a lawyer, or you're just
11 acting on your own behalf?

12 MR. COLLIER: Sir, I have not been able to obtain a
13 lawyer --

14 THE COURT: Okay.

15 MR. COLLIER: -- simply because of this -- in the
16 State of Texas, they have what they call expedited foreclosure.

17 THE COURT: Right.

18 MR. COLLIER: And if you do not -- I had received a
19 court docket (sic) which was supposed to have given me a day in
20 court to be heard --

21 THE COURT: Mr. Collier, the only reason I --

22 MR. COLLIER: -- but --

23 THE COURT: -- I ask you whether you have a lawyer is,
24 if you did, one of the lawyers, who I'm going to address my
25 remarks to, couldn't contact you directly. But since you don't

1 have a lawyer, I would ask that a lawyer on behalf of the trust
2 contact Mr. Collier and discuss his situation with him and
3 see -- you may need to get in touch with Ocwen; you may not be
4 able to get anything accomplished, but I would -- so I'm going
5 to direct that a lawyer -- the appropriate lawyer for the trust
6 contact Mr. Collier.

7 MR. COLLIER: May I make a -- before you make that
8 decision, thank you, sir, but I have dealt with mortgages
9 pretty much most of my life. In December of that time, I told
10 them to simply refi instead of modifying my loan; to simply
11 refinance my loan.

12 THE COURT: Okay, we're not going to take the time
13 now --

14 MR. COLLIER: Then --

15 THE COURT: Mr. Collier --

16 Mr. Wishnew or Mr. Flanigan, do you have contact
17 information for Mr. Collier?

18 MR. WISHNEW: We will pull his proof of claim and use
19 the contact information --

20 THE COURT: All right.

21 MR. WISHNEW: -- on that.

22 THE COURT: So one of the lawyers is going to be
23 directly in touch with you, Mr. Collier; whether they can help
24 you, I don't know, but we'll at least get that started. Okay,
25 I read and reviewed your objection to the motion before me.

1 Does anybody else on the phone wish to be heard?

2 All right. Mr. Flanigan, I'll let brief remarks.

3 Anything else you want to add?

4 MR. FLANIGAN: Your Honor, may I suggest that -- I
5 want to make sure that our brain trust -- and I say that with
6 tongue in cheek -- doesn't have some idea that we can put
7 forward to you that would convince you to do this. So I'm
8 going to request -- but I don't believe that we will have one,
9 but request that it be put over to the next docket. We'll
10 withdraw the motion if we can't come up with something that we
11 think will address your remarks specifically. We do not want
12 the expert appointed. So --

13 THE COURT: All right. I will continue the matter to
14 the next omnibus hearing date. The trust must file on ECF any
15 supplemental document, whether -- if it's just simply
16 withdrawing their objection -- their motion or if they're going
17 to proceed, at least one week before that hearing, I want to
18 have on ECF so that anybody's who's objected has an opportunity
19 to read what's there. But we'll continue it to the next
20 omnibus hearing.

21 Mr. Silver?

22 MR. COLLIER: Thank you, Your Honor.

23 THE COURT: Go ahead, Mr. Silver. Your name is
24 Silver, right?

25 MR. SILVER: Yes, sir; yes, sir, it is. Really quick;

1 when they file this thing, this -- the supporting document, or
2 the next information, do you require those of us who have filed
3 an objection, if we wish to withdraw that objection, a
4 withdrawal of the objection?

5 THE COURT: No, you don't have to do anything.

6 MR. SILVER: I wouldn't have to do anything else.

7 THE COURT: No. But --

8 MR. SILVER: I could file a reply --

9 THE COURT: Mr. Flanigan, what -- what -- the one
10 thing I would direct -- because we've got pro se parties who
11 are not on ECF -- that a copy of any supplemental filing be
12 sent by mail to those people like Mr. Silver, or those who have
13 filed written objections. Okay?

14 MR. FLANIGAN: Yes, Your Honor.

15 THE COURT: Thank you very much.

16 MR. SILVER: Okay, thank you.

17 THE COURT: All right. So this is adjourned for the
18 next hearing. And just to make clear, any of the objectors
19 aren't required -- you can appear at the next hearing, if you
20 wish; you don't have to.

21 MR. SILVER: Okay.

22 THE COURT: I have your objections. And --

23 MR. SILVER: I just thought it was more diligence to
24 be here in person, since it's only the two out of three --

25 THE COURT: That's fine. No, I'm happy to have you

1 here. Okay?

2 MR. SILVER: I'm happy to be here; I've learned a lot.

3 THE COURT: All right.

4 MS. LANZETA: Your Honor --

5 THE COURT: Yes, quick.

6 MR. COLLIER: Thank you.

7 MS. LANZETA: May I submit a written objection after
8 this?

9 THE COURT: No; time for objections has passed.

10 MR. NEWTON: Good morning, Your Honor; James Newton on
11 behalf of liquidating trust. The next matters on the agenda
12 relate to numerous correspondences filed by borrower Jorge
13 Cerron. Those include docket numbers 6860, 6863, 7065, 7034,
14 7051, 7071 and 7126. Your Honor, with me in the courtroom I
15 have the trust declarant, Lauren Delehey, on --

16 THE COURT: All right, Mr. Cerron?

17 MR. CERRON: Yes, good morning, Your Honor. Thank you
18 for having me in the court.

19 THE COURT: Okay. I just wanted to make sure you were
20 there.

21 Go ahead, Mr. Newton.

22 MR. NEWTON: And on the phone, we also have Nick
23 Voelker from Bradley Arant, in case there's questions about the
24 recent developments in the underlying foreclosure.

25 Your Honor, I'm happy to take this in any way you

1 like; these are Mr. Cerron's requests, so if you don't have any
2 initial questions for me, I'm happy to turn the podium over to
3 him.

4 THE COURT: All right, Mr. Cerron, go ahead. So what
5 I have before me --

6 MR. CERRON: Yes.

7 THE COURT: Let me just spell -- and I'll give you in
8 a second. I have Mr. Cerron's motion for relief from the
9 automatic stay; it's filed as ECF docket number 6860 -- 6860,
10 and Mr. Newton identified the -- some of the correspondence
11 from Mr. Cerron. A duplicate of the motion was filed as a
12 different docket number, 6863, and there are also supplements
13 to the motion and affidavits: 7034, 7054, 7068, 7071, 7126.

14 Go ahead, Mr. Cerron.

15 MR. CERRON: Thank you, Your Honor. My number is
16 Jorge Cerron, and I'm calling from Sarasota, Florida, where the
17 actual foreclosure case, initiated by GMAC versus myself, is
18 starting 2009. Since that starting of the foreclosure, I have
19 been a pro se defendant, and just to give you a brief history
20 of the case, in 2009, GMAC filed, in its complaint of
21 foreclosure, on September 14, 2009. And I have include in my
22 papers sent to your attention the pertinent copies in reference
23 to my claims.

24 We have a claim that GMAC has no standing at a time of
25 filing this foreclosure because GMAC didn't have the underlying

1 note, the solvent note, for my mortgage. Consequently, just to
2 make a brief history -- because I already sent you all the
3 details, and you probably have it --

4 THE COURT: Yes, but I just want to make clear, Mr.
5 Cerron, I've read everything that you've provided the Court.

6 MR. CERRON: Thank you very much, Your Honor. So just
7 to make a brief -- very shortly, the foreclosure was granted to
8 GMAC. They pretty much foreclosed on my property in 2011, they
9 conduct the sale of my property, and to be able to do that
10 sale, they obtained a certificate of title, and that also is my
11 exhibit that has been submitted to the Court. And that
12 certificate of title, just to have everybody in the same page,
13 is marked as Exhibit D -- D as in dog.

14 Now, the certificate of title clearly shows that they
15 don't take a clear title in August 31, 2011, and therefore, all
16 the encumbrances on the title, mortgage note were extinguished.

17 Consequently, I filed my appeal, and I was able to
18 prevail on my appeal. In 2012, the Second District Court of
19 Appeals reversed the case, ordering, in his opinion and his
20 mandate -- which is marked with Exhibit A -- order for the
21 reversal of the summary judgment. And that order also was to
22 reverse the previous certificate of title and foreclosure sale,
23 and all those documents which were pertaining to the previous
24 final judgment is reversed by the Second District Court of
25 Appeals.

1 At that point, I discovered that GMAC filed for
2 bankruptcy, so they filed their bankruptcy status. And that
3 case continued in the court until 2013 -- I believe, probably
4 to December 2013; the plaintiff came to the Court alleging that
5 they have transfer my loan and mortgage in bundle of loans that
6 were --

7 THE COURT: Mr. Cerron, let me -- I want to interrupt
8 you, because if I understand all of the papers correctly, after
9 Ocwen was substituted as the plaintiff in the foreclosure
10 action in Florida, you and Ocwen reached a consensual
11 resolution of the Florida foreclosure proceeding, and it
12 resulted in a judgment issued in favor of Ocwen on June 23,
13 2014, and that judgment schedules a foreclosure sale for
14 October 20th, 2014. So as far as this Court is concerned, the
15 issue of title and whether foreclosure is proper has been
16 resolved by you and Ocwen with the entry of a judgment in
17 Florida recently -- very recently; June 23rd, 2014 -- and
18 the foreclosure doesn't get -- doesn't occur until October
19 20th, 2014. Am I correct in all that?

20 MR. CERRON: Yes, Your Honor, but -- you are correct
21 in part. If you allow me to explain that there are issues
22 there. I'm just going to be very fast in this.

23 You are correct that we get an agreement with Ocwen;
24 however, I had my file hearing set for the 23rd. But prior to
25 that, on June 19, we have a hearing before Judge Donnellan,

1 Nancy Donnellan, and I emphatically request for the
2 postponement of the hearing, because I have stated I have a
3 hearing at your court on the 26th, three days after that. They
4 denied my motion to postpone the hearing, and at that point, I
5 was really indirectly forced to come to an agreement with
6 Ocwen.

7 THE COURT: Mr. Cerron? Mr. Cerron? If you want to
8 challenge the settlement and the judgment that's been entered
9 in Florida between you and Ocwen, it's not me who does that,
10 okay? You have filed a proof of claim for damages -- well, you
11 didn't file a proof of claim; that's, I think, the major point.
12 There was a bar date. You didn't file a proof of claim seeking
13 damages from any of the debtors. One of the issues that's
14 before me is whether to permit you to file a late proof of
15 claim --

16 MR. CERRON: Yes.

17 THE COURT: -- well after the deadline for doing so.
18 Let me ask Mr. Newton.

19 Did Mr. Cerron receive notice of the bar date?

20 MR. NEWTON: He did, Your Honor. And attached as
21 Exhibit 2 -- I apologize; Exhibit 3 to our response is an
22 excerpt from the affidavit of service regarding the notice of
23 bar date containing Mr. Cerron's information.

24 THE COURT: Okay.

25 MR. CERRON: I will have to contest that, Your Honor.

1 I was not properly served with that.

2 THE COURT: All right. I'm going to take this matter
3 under submission.

4 THE COURT: All right. I'm going to take this matter
5 under submission. I have reviewed the papers carefully. With
6 respect to the foreclosure issues, they're clearly resolved. I
7 mean, it was between Ocwen and Mr. Cerron. A judgment's been
8 entered. He's still in possession. This is just last week
9 that the judgment was entered. Foreclosure isn't going to
10 occur until October, but that's an agreed judgment. If Mr.
11 Cerron has a problem with that judgment, he's going to have to
12 go to the Florida court to deal with that.

13 The issue really before me is whether to lift the stay
14 to allow him to proceed with the damages action when he didn't
15 file a proof of claim in this case. I'm going to take that
16 matter under submission.

17 THE COURT: Thank you, Mr. Newton.

18 Thank you, Mr. Cerron.

19 MR. NEWTON: Thank you, Your Honor.

20 MR. CERRON: Mr. Markingly (ph.) -- Your Honor, I just
21 have a last question, if I may?

22 THE COURT: Go ahead.

23 MR. CERRON: Yes, I'm looking forward to have my claim
24 approved, so I can submit my claim. I don't know if I can
25 submit my claim right now orally against GMAC for the losses

1 that I have suffered.

2 THE COURT: No, you can't. The issue that's pending
3 before me is to allow you -- whether you would be permitted to
4 file a late proof of claim in this case. I have not permit --

5 MR. CERRON: So I will have --

6 THE COURT: I have not permitted damage actions
7 against GMAC and to proceed in state court anywhere. The
8 claims have to be brought here. There is no timely proof of
9 claim. I will have to consider whether to permit an untimely
10 proof of claim. All right.

11 Mr. Newton's, what is the next --

12 MR. CERRON: And I would like you to please take
13 into --

14 THE COURT: Mr. Cerron, thank you very much. I'm
15 moving onto the next matter on the calendar.

16 MR. NEWTON: Your Honor, the next matter is --

17 MR. CERRON: Thank you, Your Honor. Appreciate it.

18 THE COURT: Okay, Mr. Cerron.

19 MR. NEWTON: The next matter is the adversary
20 proceeding matter that's on for today.

21 THE COURT: All right. While counsel -- this is the
22 UBS -- okay. Let's take a ten-minute recess and we'll come
23 back in and hear argument. This is on the motion to remand the
24 case to state court.

25 (Recess from 11:33 a.m. until 11:45 a.m.)

1 THE COURT: All right. Please be seated.

2 We're here in Residential Funding Company, LLC v. UBS
3 Real Estate Securities, Inc. It's adversary proceeding number
4 14-01926.

5 Counsel, make your appearances.

6 MR. FUMERTON: Good morning, Your Honor. Robert
7 Fumerton, Alex Drylewski, and Brett Edkins from Skadden, Arps
8 for defendant UBS Real Estate Securities, Inc. Mr. Drylewski
9 will be conducting the argument.

10 THE COURT: Okay.

11 MR. NESSER: Isaac Nesser of Quinn Emanuel. I'm here
12 with James Tecce of my firm and John Sullivan. We represent
13 the ResCap Liquidating Trust.

14 THE COURT: Thank you very much.

15 All right. For the moving party?

16 MR. DRYLEWSKI: Good morning, Your Honor. Alex
17 Drylewski on behalf of UBS.

18 We're here today on UBS's motion to remand this action
19 back to state court. And as I informed Your Honor on Tuesday,
20 we've also filed a motion to withdraw the reference and that --

21 THE COURT: It's before Judge Daniels?

22 MR. DRYLEWSKI: Judge Daniels, correct, Your Honor.
23 We have a pre-trial conference scheduled in front of Judge
24 Daniels for July 10th.

25 THE COURT: Okay.

1 MR. DRYLEWSKI: This action, Your Honor, was commenced
2 in New York State Court in December of last year. It asserts
3 exclusively state common law causes of action arising out of
4 pre-petition contracts entered into between UBS and RFC
5 relating to the sale of mortgage loans.

6 Now, despite choosing New York as its forum, plaintiff
7 them removed its own action three months later, asserting for
8 the very first time that this Court has exclusive jurisdiction.
9 Once the case was removed, it was referred to Your Honor under
10 the district's amended standing order of reference.

11 Now, UBS has moved to remand on three principal
12 grounds: (1) that the Court lacks subject matter jurisdiction,
13 (2) that mandatory abstention applies and (3) that equitable
14 abstention should apply.

15 With the Court's permission, I would like to address
16 at the onset, the mandatory abstention doctrine because we
17 believe that all six factors have been met here.

18 THE COURT: No. Actually what I'd like you to address
19 first is whether the Court has subject matter jurisdiction.

20 MR. DRYLEWSKI: Sure, Your Honor.

21 THE COURT: Because if I don't have subject matter
22 jurisdiction, end of discussion.

23 MR. DRYLEWSKI: Absolutely, Your Honor. And mandatory
24 abstention obviously applies even this Court were to find that
25 it had related-to jurisdiction. We submit here there's no

1 related-to jurisdiction.

2 First and foremost, this case doesn't arise under
3 Title 11 or in a case under Title 11. The cases that we cited,
4 pages 9 and 10 of our opening brief, make clear that a case
5 arises under Title 11 where the causes of action or the
6 substantive right to be enforced is created by the Bankruptcy
7 Code. That's not the case here.

8 Cases also arise under a Title 11 proceeding where
9 they would have no independent existence outside of the
10 bankruptcy. Again, that's not the case here. What plaintiff
11 claims is that this is a core proceeding because it constitutes
12 a "mirror image counterclaim" of the proof of claim that UBS
13 submitted in 2012 in the ResCap bankruptcy. Your Honor, we
14 think that there's several problems with that theory.

15 First of all, the proof of claim is not a mirror image
16 of this action at all. That proof of claim arises out of
17 entirely different contracts, entirely different loans, and
18 entirely different third-party claims.

19 THE COURT: Let me ask you this question. And you
20 told me the other day that the contract by which UBS purchased
21 loans from RFC was -- the exact name was the master seller's --

22 MR. DRYLEWSKI: Purchaser's warranties agreement.

23 THE COURT: Right, warranties agreement.

24 MR. DRYLEWSKI: Yeah, it's a tongue-twister.

25 THE COURT: Okay. And what was the contract by which

1 UBS purchased loans from RFC?

2 MR. DRYLEWSKI: It was a distinct contract, Your
3 Honor.

4 THE COURT: Well, was that also a UBS-prepared master
5 purchaser's agreement?

6 MR. DRYLEWSKI: I can't speak to the specifics of that
7 contract. I can tell you only when I say they're different
8 contracts, it wasn't one contract governing a reciprocal sale
9 of loans.

10 THE COURT: I understand that. It was a separate
11 contract, but was it a UBS contract by which UBS, as opposed to
12 an RFC form of contract by which UBS acquired loans from RFC?

13 MR. DRYLEWSKI: Yeah, I can't tell you with one
14 hundred percent certainty that it was an RFC contract. I can
15 say that typically in this space, the loan seller is the one
16 who drafts the contract governing the terms of the sale.

17 THE COURT: Except in the case of RFC and it usually
18 has -- yes, that's true, but that wasn't true with respect to
19 loans you bought from RFC. It wasn't the seller's form. It
20 was a UBS form.

21 MR. DRYLEWSKI: That's true, Your Honor.

22 THE COURT: And so I don't know.

23 Mr. Nesser, are you able to tell me whether the
24 contract by which UBS bought loans from RFC was a RFC form or a
25 UBS form?

1 MR. NESSER: Standing here right now, Your Honor, I'm
2 not able to answer that. We can --

3 THE COURT: So I'm going to want to know from the
4 part -- I want to see the contracts, okay? I really -- so I
5 want to -- and there may be some other supplemental filings I
6 want, but I want to see -- because, look, one of the arguments
7 that the trust makes is that, whether or not an Article I judge
8 can enter a final order or judgment, what's involved here is a
9 counterclaim to the proof of claim. And UBS filed a proof of
10 claim before RFC filed its lawsuit. You agree with that?

11 MR. DRYLEWSKI: Yes, Your Honor.

12 THE COURT: Okay. Mr. Nesser.

13 MR. NESSER: Your Honor, my colleague has handed to me
14 a contract --

15 THE COURT: Okay.

16 MR. NESSER: -- pursuant to which UBS purchased loans
17 from RFC. That contract was e-filed in the case 14-cv --

18 THE COURT: Speak up a little louder.

19 MR. NESSER: -- 14-cv-02170, Document 1. It was filed
20 on March 27, 2014, at page 70 of that filing, and it's a UBS
21 contract.

22 THE COURT: Okay. So I want to see the two contracts,
23 the two contracts I'm talking -- and I understand -- if I'm
24 understanding you correctly, Mr. Drylewski, when -- well, let
25 me ask this. Was it a master contract by which UBS purchased

1 loans from RFC over time or were there separate contracts every
2 time there was a purchase?

3 Mr. Nesser, are you able to tell me that?

4 MR. NESSER: The contract on its face is named a
5 master contract.

6 THE COURT: Okay. So assuming that there was one
7 master contract, are the terms of the contract -- and I want
8 the parties to address this -- are the terms of the contract by
9 which RFC purchased loans from UBS the same or different from
10 the terms by which it sold loans to UBS?

11 So on the issue of whether a court or courts in
12 resolving the competing claims -- I'll just use the term claims
13 for now -- are the courts going to have to interpret the same
14 contract language so -- there may be lots of things that are
15 different, but the lawsuit that the trust has filed against
16 RFC -- or initially it was RFC that filed it in state court,
17 there are two basic claims that are being asserted: breach of
18 the representations and warranties, and then indemnification.

19 And so what I want the parties to focus on and provide
20 me (a) with the contracts and memoranda -- we'll talk about
21 page limits after -- whether the reps and warranty provisions
22 in the two contracts or sets of contracts are the same or
23 different and whether the indemnification clauses are the same
24 or different, such that courts in adjudicating the rights of
25 the parties on claims and counterclaims has to do it on the

1 basis of interpretation of the same contract language. There
2 may be lots of other provisions that are different, but that's
3 not what this dispute is about. This dispute primarily is
4 about the reps and warranty claims and the indemnification
5 claims.

6 So in what I looked at, I obviously couldn't answer
7 the question. That's why I am asking it.

8 MR. DRYLEWSKI: Absolutely, Your Honor. We're happy
9 to do that, and I'd just like to give a couple of responses --

10 THE COURT: Go ahead.

11 MR. DRYLEWSKI: -- to what Your Honor just said.

12 First of all, our position is that irrespective of the
13 overlap in the terms of the two contracts, the sales constitute
14 completely separate transactions or occurrences.

15 THE COURT: Oh, I understand your position.

16 MR. DRYLEWSKI: Yes.

17 THE COURT: Don't -- they're separate transactions,
18 and it may be that a court will determine that it -- and maybe
19 this court will determine or withdraw the reference a court
20 will determine or if it gets remanded to state court, I won't
21 have to determine, but whether -- look, the statute -- the
22 remaining statute defines counterclaims by the estate as
23 statutory core. Stern and Arkison raise questions about how
24 that applies but nevertheless, it's defined as statutory core.
25 It may be that an Article I judge can't enter a final order or

1 a judgment with respect to RFC or the trust's claims against
2 UBS. You file a proof of claim in my court, you've submitted
3 to bankruptcy court jurisdiction to a determination of the
4 proof of claim if what's involved is interpretation of the same
5 contract language, query whether different courts ought to be
6 doing that at different --

7 MR. DRYLEWSKI: And Your Honor raises a point that I
8 was going to make next.

9 THE COURT: Okay.

10 MR. DRYLEWSKI: And it's an important point. And
11 that's that the proof of claim and the counterclaim implicate
12 different legal issues as well. I mentioned this on Tuesday
13 and I'll reiterate it. UBS intends to move to dismiss this
14 claim on several threshold dispositive issues including statute
15 of limitations, failure to comply with the conditions precedent
16 under the contract, the notice condition precedents.

17 Now, RFC does not have those defenses available to the
18 proof of claim. RFC hasn't asserted those defenses to the
19 proof of claim. Their objection was solely on insufficient
20 documentation.

21 So, Your Honor, it's uncontested by plaintiff here
22 that adjudication of the proof of claim will not necessarily
23 resolve this action.

24 THE COURT: I don't think it's conceded but --

25 MR. DRYLEWSKI: It's not contested, Your Honor.

1 THE COURT: Well, have they filed an objection to your
2 proof of claim yet?

3 MR. DRYLEWSKI: They did file an objection, and it's
4 based solely on insufficient documentation.

5 THE COURT: And did they waive any other objections to
6 your claim?

7 MR. DRYLEWSKI: It's not clear, Your Honor. I can
8 represent --

9 THE COURT: That might --

10 MR. DRYLEWSKI: -- UBS has given notice in connection
11 with that proof of claim. So --

12 THE COURT: Has given notice of what?

13 MR. DRYLEWSKI: Notice of the indemnification claim,
14 so that they don't have that sort of defense available to them.
15 They also don't have the statute of limitations defense
16 available to them. And as Your Honor mentioned already and as
17 the Court well knows, under the new Arkison decision, which
18 just came out a couple of weeks ago, it came out actually the
19 day before our reply brief was due, where you have a situation
20 such as a so-called Stern claim where adjudication of the proof
21 of claim won't necessarily resolve the purported counterclaim,
22 the Court must treat those claims as noncore in nature,
23 notwithstanding the fact that it may technically be labeled
24 core under 157(b)(2)(C).

25 THE COURT: Well, I have to treat it as -- assuming

1 that Arkison applies in the particular circumstances, a
2 determination I'm not making now, I would treat an otherwise
3 statutory core claim as noncore for purposes of whether the
4 Court can enter final order of judgment or has to do purposed
5 findings of fact and conclusions of law. That isn't to say
6 that it means that it's no longer treated as core, for example,
7 for purposes of mandatory versus permissive abstention,
8 different issue, not decided in Arkison.

9 MR. DRYLEWSKI: Your Honor, if you look at pages 9 and
10 10 of the slip opinion in Arkison, what the Court does there is
11 it says, all right, you have a so-called Stern claim, we're
12 going to treat that as noncore.

13 THE COURT: Treat it as noncore; doesn't say treat it
14 as noncore for purposes of mandatory or permissive abstention.

15 MR. DRYLEWSKI: Well, that's true, Your Honor, but
16 then it drops a hint as to what it meant there. It says that
17 "At the next analysis, you must go onto Section 157(c) to see
18 whether the Court has related-to jurisdiction to determine
19 whether the Court can even issue findings of fact and
20 conclusions of law subject to de novo review."

21 So I think when you read Arkison as a whole, it's
22 clear that what the Court is saying there it's determining
23 whether the Court has a core jurisdiction for all purposes
24 based on the resolvability that the Stern -- so-called Stern
25 analysis.

1 THE COURT: So let's -- I want you to focus on subject
2 matter jurisdiction of the trust or RFC's complaint against
3 UBS.

4 MR. DRYLEWSKI: Yes, Your Honor. So as I said, we
5 submit that Arkison forecloses the argument about the proof of
6 claim.

7 THE COURT: Could you move onto what I've asked you to
8 address?

9 MR. DRYLEWSKI: Yes. So their next basis for core
10 jurisdiction is that this action represents claims against
11 third parties, the recoveries of which will inure to the
12 benefit of former creditors of RFC. Your Honor, that theory of
13 core jurisdiction has been roundly rejected by the Second
14 Circuit and by numerous judges in this district. We cite for
15 that the In re Orion case, that's 4 F.3d at page 1102. We cite
16 Judge Koeltl's decision in Little Rest Twelve. We cite Judge
17 Bernstein's decision in the In re General Media case. All of
18 these decisions stand for the proposition that simply because a
19 state contract action may potentially augment the estate or the
20 coffers of a trust for the benefit of general distributions to
21 creditors, that fact alone is insufficient to render a
22 proceeding core.

23 THE COURT: Okay. Does the trust's claim against UBS
24 for indemnification -- let's put aside the separate rep and
25 warranty claim, but does the trust's claim against UBS for

1 indemnification require a court to interpret and apply a
2 confirmed Chapter 11 plan in this case?

3 MR. DRYLEWSKI: We don't believe so, Your Honor.

4 THE COURT: Okay. So can you walk me through the
5 provisions -- so what was briefly said at the case management
6 conference a few days ago, and the trust argues it in their
7 briefs here, that an issue for a court on indemnification --
8 let's assume just for purposes of discussion that UBS breached
9 reps and warranties with respect to ten million dollars of
10 loans that were purchased -- let me reverse that.

11 Let's assume that you purchased loans from -- UBS
12 purchased loans from RFC and RFC breached reps and warranties
13 on ten million dollars of loans, RFC settled the RMBS claims as
14 part of the confirmed plan and I approved that settlement as
15 fair, reasonable and in the best interest. Confirmation
16 judgment is final, wasn't appealed. The plan has provisions
17 dealing with how recoveries from the plan are allocated. Duff
18 & Phelps developed a model that ultimately was approved. On
19 page 66 of 265 of ECF docket number 6065-1, it's Appendix 1 to
20 the plan, there's a provision romanette (ii)(1) about
21 recognized original R+W claims. On page 62, subsection (d) --
22 that's page 68 of 265 -- allocation of units in the RFC pool to
23 RMBS trusts with recognized claims against RFC.

24 So the basis, as I understand it, of the RFC
25 indemnification claim is we got claims asserted against us for

1 breach of representations and warranties. We settled with the
2 trust as part of the plan confirmed. And a portion of the
3 settlement amount is attributable to defective loans we
4 purchased from UBS. And therefore, we're entitled to
5 indemnification from UBS.

6 To determine how much, if any, the trust is entitled
7 to recover from UBS on its indemnification claim, doesn't that
8 require interpretation and application of the confirmed plan
9 and a fairly complex set of provisions that deal with -- just
10 dealing with -- it's broken down GMAC, M-claims, RFC claims.
11 In Appendix 1, at page 190 of 265 in the same 6065-1 unit,
12 there's a chart that shows, with various securitization trusts,
13 what the loss due to breach was, how much the recognized claim
14 is, et cetera.

15 So one of the things that is troubling me and it's not
16 really well identified in the briefing I have -- I mean, they
17 argue -- the other side argues, yes, you have to apply the
18 plan, but it does seem to me that there is a very complex
19 issue, assuming that there were defective mortgages that UBS
20 sold to RFC that went into securitization trusts for which RFC
21 settled, approved as part of the global plan -- as part of the
22 plan, how it would be determined what the amount of
23 indemnification they're entitled to. Can you address that?

24 MR. DRYLEWSKI: Yes, Your Honor, and I think I'm
25 perceiving two separate questions in Your Honor's comments, and

1 I'd like to keep them separate.

2 THE COURT: Okay.

3 MR. DRYLEWSKI: The first is whether that
4 interpretation of the plan renders this action core, and the
5 second is whether that interpretation of the plan and the terms
6 gives this Court related-to jurisdiction.

7 Now, as to the first, we think that the answer is no
8 under well-established law. Orion is clear that in any state
9 action that is looking to increase recoveries for creditors,
10 former creditors, that alone is not enough to render an action
11 core.

12 THE COURT: This is the other side of the coin. This
13 is how much they're entitled to -- it isn't just increasing
14 recoveries -- well, go ahead. Go on with your argument.

15 MR. DRYLEWSKI: Sure, Your Honor. And what plaintiff
16 will be entitled to recover in this action, it really will rise
17 and fall on this action. It will rise and fall on whether or
18 not UBS' specific loans breached reps and warranties in the
19 specific contracts that UBS entered into with RFC. Now, those
20 are purely state common law causes of action that do not rely
21 on the Bankruptcy Code or an interpretation of the bankruptcy
22 plan.

23 THE COURT: So whether the issues that have to be
24 resolved are state or federal doesn't resolve whether the
25 claims are core or not. I mean, the code says that

1 specifically, and the case law clearly supports that, too.

2 MR. DRYLEWSKI: That's absolutely true, Your Honor,
3 but there has to be a hook either under -- a statutory hook
4 under 157 or it has to either arise under Title 11 or in a case
5 under Title 11.

6 THE COURT: And now I'm raising the question with you
7 whether the statutory hook is, in order to resolve these
8 claims, it requires an interpretation and application of the
9 plan with respect to determining the amounts of indemnification
10 that RFC, here the trust, would be entitled to recover.

11 Look, I talked the other day about Judge Rakoff's Flag
12 Star decision. It's complicated, but nevertheless the amount
13 recoverable wasn't capped by the claims against Flag Starr. It
14 was -- he determined ultimately how much was recoverable
15 because of breaches of reps and warranties in connection with
16 the loans that were sold.

17 MR. DRYLEWSKI: Sure. And this Court did determine
18 the reasonableness of the settlement of rep and warranty claims
19 against the estate when it approved that 8.7 billion dollar cap
20 on allowed claims. But again, we think that, assuming this
21 case moves past the motion to dismiss stage, this is really
22 going to turn on the indemnification right in the contract.
23 UBS is entitled or obligated to indemnify RFC for breaches of
24 reps and warranties, for losses and liabilities arising out of
25 breaches of reps and warranties, and that's going to rise and

1 fall, in this action, separate and apart from what happened in
2 the bankruptcy proceeding.

3 THE COURT: But to determine the amount that RFC could
4 recover from losses, you'd have to figure out how much it had
5 to pay as a result of those breaches of reps and warranties.
6 That requires you -- seemingly requires you to go to the plan.

7 So one of the things I want both sides to do in the
8 supplemental -- same supplemental filing is address
9 specifically for the Court whether determining the amount of
10 any recovery by the trust from UBS for breaches of reps and
11 warranties -- for indemnification as a result of breaches of
12 reps and warranties, requires a court to interpret and apply
13 the confirmed Chapter 11 plan, okay? It's just -- your brief's
14 good. Their brief's good.

15 MR. DRYLEWSKI: Yes.

16 THE COURT: The law in this area seems to me to be
17 quite complicated.

18 MR. DRYLEWSKI: We're happy to address that, Your
19 Honor. I would just note that if that were the case, then
20 every post-confirmation indemnification claim brought by a
21 trustee would be swept within the core jurisdiction of the
22 bankruptcy court.

23 THE COURT: Not if all of them had been -- perhaps
24 if -- if all of them had been settled and the amount of the
25 settlement or the methodology of payments under that settlement

1 by the estate was required to be interpreted and applied, this
2 may well fit within post-appropriate, post-confirmation
3 jurisdiction.

4 Look, there's no question here -- you can quibble all
5 you want about it and I know you argue on the one hand that the
6 plan here said filed in any court with competent jurisdiction
7 and they say there's a provision that says the bankruptcy court
8 retains exclusive jurisdiction.

9 MR. DRYLEWSKI: Right.

10 THE COURT: In my view, there's no question that the
11 plan has a provision that would retain jurisdiction of the
12 bankruptcy court if the jurisdiction existed. The law is clear
13 that plan language can't create jurisdiction. It can retain
14 jurisdiction. It can't create it. So you go to that step of
15 is there jurisdiction, okay?

16 And it does seem to me that, in part, this hinges on
17 whether I have to interpret -- or whether any court has to
18 interpret and apply the language of the confirmed plan. The
19 notion of having twelve judges having to do the same thing, ten
20 judges in Minnesota, me here, and perhaps a state court judge
21 in Manhattan, whatever happened to the notion of efficiency and
22 consistency of results? That's why I'm asking these questions.

23 It may be that you will persuade me that the
24 resolution of the indemnity claim, assuming -- and for purposes
25 of the discussion, you assume there is a breach of reps and

1 warranties, okay? Then what follows with respect to the
2 indemnification claim.

3 MR. DRYLEWSKI: Sure, Your Honor.

4 THE COURT: Okay.

5 MR. DRYLEWSKI: And there is a nuance I want to just
6 introduce --

7 THE COURT: Go ahead.

8 MR. DRYLEWSKI: -- in that analysis and it's whether
9 or not -- assuming just for the sake of argument that the Court
10 is obligated to interpret the terms of the plan in order to
11 resolve the indemnification claim, does that give rise to core
12 bankruptcy jurisdiction or related-to jurisdiction? We would
13 submit that at most, it would be related-to jurisdiction. And
14 the reason why that distinction is important here is because we
15 believe mandatory abstention applies and that applies even if
16 there's related-to jurisdiction.

17 So if you would like, Your Honor --

18 THE COURT: Well, mandatory jurisdiction -- a
19 mandatory abstention is not absolute. Do you agree with that?

20 MR. DRYLEWSKI: Well, if all six factors are met then,
21 Your Honor, the law is clear that mandatory abstention is
22 mandatory.

23 THE COURT: Okay. But some of those factors require a
24 balancing, require an analysis of whether the state court can
25 timely adjudicate the claims. So it's not -- they're not

1 bright line -- each of the six factors is not a bright line
2 factor. Would you agree with me on that?

3 MR. DRYLEWSKI: I would. And the one that we're
4 specifically here to discuss is that timely adjudication prong,
5 and with the Court's permission, I'd be happy to address that
6 now.

7 THE COURT: Go ahead.

8 MR. DRYLEWSKI: So what plaintiff argues here is that
9 UBS has not demonstrated that this action could be timely
10 adjudicated by the commercial division. We'll put aside for
11 the moment the irony that the forum they chose to litigate in
12 originally is incapable of doing so now. They're also wrong on
13 the law here. The burden is on the plaintiff to show --

14 THE COURT: Well, I think the law is unclear upon
15 which party the burden rests. The Second Circuit in Parmalat
16 has a footnote that addresses this issue of burden but doesn't
17 decide it.

18 MR. DRYLEWSKI: That's true, Your Honor.

19 THE COURT: There's a split in authority among courts
20 as to who has the burden. I understand that. I'm not saying
21 which is the right answer, but there's a -- so you can't say
22 with complete authority that the law is clear, Your Honor, that
23 the party that brought the action has the burden of
24 establishing --

25 MR. DRYLEWSKI: Your Honor, and we cite to that

1 Parmalat decision where the Second Circuit said -- and it
2 wasn't a holding, you're correct, but they said in suggestive
3 language that principals of comity --

4 THE COURT: Look, I'm familiar with the issue. And
5 even if the burden is on the trust, then I'll have to evaluate
6 whether they've carried the burden. And they've attempted to
7 do that. I mean, they argue that you have the burden, but
8 they've attempted to carry -- whoever has the burden, that
9 might be the dispositive issue here.

10 MR. DRYLEWSKI: Sure, Your Honor. And we do cite
11 numerous post-Parmalat decisions placing the burden on the
12 plaintiff in the timely adjudication factor. Those are the In
13 re Tronox case by Judge Gropper, the Judge Sands decision in
14 Allstate v. Ace. So the Courts have taken the Second Circuit's
15 heeding.

16 THE COURT: I understand your argument. I know where
17 the cases have gone on the issue. It's still not a bright line
18 that it definitively -- there still has to be an analysis of
19 facts.

20 MR. DRYLEWSKI: So let's move onto that analysis then.
21 What UBS demonstrated on the record in this case is, one, we
22 cite to Your Honor the administrative order by the commercial
23 division.

24 THE COURT: So would you agree with me that none of
25 those cases involve claims and counterclaims between the

1 parties?

2 MR. DRYLEWSKI: I'm sorry, Your Honor, the cases
3 discussing the timely adjudication?

4 THE COURT: The cases on mandatory abstention. None
5 of those cases arise in circumstances where there are claims
6 and counterclaims between the parties.

7 MR. DRYLEWSKI: I'm not aware one way or the other. I
8 know that we cite a number of decisions that hold that even
9 where there's a counterclaim, a purported counterclaim, the
10 Court found that there was not core bankruptcy jurisdiction.
11 We cite, you know, Judge Stanton's decision in In re Durso.
12 That's 170 B.R. at page 213 to 214. There Judge Stanton
13 rejected the same argument plaintiff makes here on the ground
14 again that the proof of claim and the counterclaim are
15 unrelated. So there are those cases out there.

16 THE COURT: That's one of the reasons I want to see
17 whether there's the same contract language that has to be
18 interpreted and applied for both the claims and counterclaims.

19 MR. DRYLEWSKI: Sure. And then you get to the issue
20 of the different legal issues and that resolution of one won't
21 necessarily resolve the other.

22 THE COURT: Right.

23 MR. DRYLEWSKI: But if we could go back to the timely
24 adjudication prong for a moment, what we cited to Your Honor at
25 Fumerton declaration, Exhibit K, is an administrative order by

1 the commercial division.

2 THE COURT: Yes, I understand. You pointed out to me
3 that Justice Marcy Friedman has all of the RMBS cases.

4 MR. DRYLEWSKI: So what we have -- the record shows we
5 have essentially an expert court in the commercial division
6 handling these types of claims and defenses.

7 THE COURT: Can you tell me how many cases she has in
8 front of her, RMBS cases?

9 MR. DRYLEWSKI: I don't have the exact number. We
10 cite to a number of them, I think at least six in footnote 14.

11 THE COURT: Can you get the -- does somebody have --
12 Mr. Nesser, do you have the statistics on how many cases she
13 has before her?

14 MR. NESSER: Your Honor, we actually prepared a
15 hand-up on that issue about the accepted --

16 THE COURT: Okay. I'll wait until you -- you can hand
17 it up when you make your argument. Okay.

18 MR. DRYLEWSKI: And I'd reserve the right to address
19 that because I haven't seen it.

20 THE COURT: Look, there's going to be -- I'm asking
21 for more briefs, so you'll have another chance.

22 MR. DRYLEWSKI: Sure.

23 THE COURT: Okay.

24 MR. DRYLEWSKI: We cite to a number of cases. That's
25 footnote 14 of our opening brief. There's also a case I

1 mentioned on Tuesday in front of Judge Friedman right now
2 involving this same UBS affiliate as a defendant, and in that
3 case, the plaintiff trust has brought claims for breach in rep
4 and warranty. UBS has asserted, in its pre-motion answer to
5 dismiss, defenses of statute of limitations and failure to
6 comply with conditions precedent. That index number, just for
7 the Court's record, is 651282-2012. That's currently pending
8 before Justice Friedman.

9 THE COURT: What's the status of it?

10 MR. DRYLEWSKI: It's -- the motion to dismiss is fully
11 briefed. It hasn't been argued yet before Justice Friedman,
12 but it's pending.

13 THE COURT: Has she set an argument date?

14 MR. DRYLEWSKI: Not yet. Justice Friedman has heard
15 argument though in other similar RMBS cases, including the ones
16 that we cite in our brief, and there's a decision on these
17 motions to dismiss pending right now.

18 And as we argue in the briefs and as Your Honor knows
19 already, those cases also involve similar defenses of statute
20 of limitations, failure to comply with condition precedent.

21 So the same types of legal issues are being handled by
22 a single judge. And we cited to Your Honor an article; it was
23 declaration -- Fumerton declaration, Exhibit B, which explained
24 the motivation behind the administrative order, and it was
25 borne out of divergent rulings by judges on this very statute

1 of limitations issue. And so the administrative order was
2 meant to promote the uniformity of application of law in this
3 area.

4 Now, plaintiff makes the claim that New York law is
5 going to apply whether we're in New York court or in federal
6 court. But, Your Honor, I know that you're well aware of the
7 legal landscape here relating to these types of claims. Ace,
8 the decision by the First Department which held that the
9 statute of limitations for these types of claims runs from the
10 date of the contract, has not been uniformly followed by
11 federal judges. We cite on page 9 of our reply brief, a
12 decision by Judge Hellerstein recently in the WMC case where he
13 refused to follow Ace on the statute of limitations issue and
14 he held that the law is "in flux."

15 Now, as Parmalat, as Your Honor knows in the Second
16 Circuit, held where the state law claims at issue involve
17 unsettled issues of state law, mandatory abstention is
18 particularly appropriate.

19 And just to address Your Honor's concern about the
20 familiarity with the settlement here, in Parmalat --

21 THE COURT: It's not just familiarity. It's not just
22 a question of familiarity with the settlement. I approved it,
23 but it's extremely complex. And so if we assume a
24 securitization trust that have mortgages that were originated
25 by several different originators, how an allocation would be

1 made, if it should be made, the question I'm raising really is
2 does that require an interpretation and application of the
3 confirmed plan and the annexes to it, and is it important that
4 there be consistency in applying it. And as with any order
5 that a court enters, the law generally is the Court that
6 entered the order is in the best position to interpret and
7 apply its own order.

8 MR. DRYLEWSKI: And we understand that concern of Your
9 Honor. We're happy to brief that further.

10 I will point out the Parmalat case which plaintiffs
11 rely on in their briefs. Parmalat was up and down a number of
12 times. There was just a decision out of the Seventh Circuit
13 yesterday finally putting to rest this timely adjudication
14 issue. But in one of the Second Circuit's decisions, it held
15 that mandatory abstention applied, and it ordered remand to the
16 Illinois state courts based on the novelty and the difficulty
17 of the state law issues and out of deference for state courts,
18 notwithstanding the fact that the district court and Judge
19 Kaplan there had already presided over the actions for a
20 significant period of time and, in fact, it even entered a
21 summary judgment order in favor of the defendants. The court
22 held, of course, it would be more timely adjudicated in the
23 federal court, but because we're dealing here in mandatory
24 abstention with the timely adjudication factor of the state
25 courts, it ordered remand. We think that issue applies -- that

1 holding applies a fortiori here.

2 We'd also just like to point out that irrespective of
3 what burden -- who has the burden here, plaintiffs have not
4 demonstrated that the commercial division can't timely
5 adjudicate that matter. We point to numerous decisions, Your
6 Honor, holding that the commercial division in Manhattan is
7 presumptively an effective forum. You yourself, Your Honor,
8 recognized that in the In re ResCap case at 488 B.R. at page --

9 THE COURT: There's two. Sealink and Deutsch
10 Landesbank.

11 MR. DRYLEWSKI: Yes.

12 THE COURT: Obviously very familiar with it.

13 MR. DRYLEWSKI: Yes. At page 576, as Your Honor
14 knows, you held that the RMBS claim at issue, a state common
15 law fraud claim, should and can be adjudicated in the
16 commercial division.

17 THE COURT: And both of those cases involved claims
18 entirely between nondebtors. Go ahead.

19 MR. DRYLEWSKI: Both parties in that case, as Your
20 Honor knows, also submitted proofs of claim in the bankruptcy.
21 And Your Honor equitably abstained and ordered remand. You
22 didn't reach the mandatory abstention issue, and that's because
23 there was a dispute between the parties as to whether there was
24 diversity jurisdiction. But here, plaintiff doesn't contest
25 that Section 1334 is the sole basis for jurisdiction. So if

1 we're just looking at the timely adjudication factor, it weighs
2 in favor of mandatory abstention.

3 Your Honor, I'd also like to briefly address, even if
4 mandatory abstention doesn't apply, we think that equitable
5 abstention is appropriate here. Courts --

6 THE COURT: You're referring to permissive abstention
7 on --

8 MR. DRYLEWSKI: Yes. It's referred to a number of
9 different ways. It's Section 1334(c)(1). The factors that
10 courts take into account there are the extent to which state
11 law issues predominate, the novelty or difficulty of those
12 state law claims, comity -- principles of comity to the state
13 court, the prejudice to involuntarily dismiss defendants, and
14 the relation or relatedness to the bankruptcy administration.

15 Here, Your Honor, federal courts --

16 THE COURT: The issue on the relatedness to the
17 bankruptcy administration is one of the reasons I asked the
18 question whether the plan must be interpreted and applied in
19 resolving the claims that the trust is asserting.

20 MR. DRYLEWSKI: Understood, Your Honor. And if we
21 just assume for the moment though, for the sake of argument,
22 that these claims are noncore, that this court has related-to
23 jurisdiction but not core jurisdiction.

24 THE COURT: So will you assume that the court that
25 resolves it has to interpret and apply the confirmed Chapter 11

1 plan?

2 MR. DRYLEWSKI: I'm not ready to assume that, Your
3 Honor.

4 THE COURT: So what happens if you do assume it? What
5 happens then to your analysis.

6 MR. DRYLEWSKI: Well --

7 THE COURT: It seems to fall apart.

8 MR. DRYLEWSKI: It depends on what you mean by
9 "interpret and apply" the plan. If the idea is we need to
10 figure out --

11 THE COURT: So go to this plan. Do you have it with
12 you?

13 MR. DRYLEWSKI: I don't have it in front of me, Your
14 Honor.

15 THE COURT: Have you made the analysis, under this
16 plan, how an indemnification claim would work, how the amount
17 that would be recoverable by the trust for indemnification
18 would be determined under the plan?

19 MR. DRYLEWSKI: No, I haven't, Your Honor. And we
20 assume that that kind of analysis is something that plaintiffs
21 would obviously try to provide --

22 THE COURT: Well, that's what I'm asking both sides to
23 do in a supplemental brief. The degree of relatedness to the
24 bankruptcy case and its administration may or may not -- I'm
25 not saying it does, but in reviewing your motion in the

1 opposition, it's an issue that I've tried to sort through. I
2 want to give the parties a chance to address it. Whether you
3 agree or not, it seems to me that I have to make this analysis
4 in order to reach a decision on the pending motion.

5 MR. DRYLEWSKI: Yes, Your Honor. And just to
6 reiterate our point for the sake of clarity here, at most,
7 assuming that we're required to interpret or analyze the plan
8 in connection with the indemnification claims here, that would
9 at most give rise to related-to jurisdiction, not to core
10 jurisdiction, because core proceedings either statutorily arise
11 under Section 157, as Your Honor knows, or they arise under or
12 in a Title 11 proceeding. None of those are met here.

13 Unless Your Honor has further questions, I'd like to
14 reserve time for rebuttal.

15 THE COURT: Let me just see if I have any other
16 questions, okay? I think I asked my questions. I'll give you
17 a chance to reply, okay?

18 MR. DRYLEWSKI: Thank you, Your Honor.

19 THE COURT: Thank you very much.

20 MR. NESSER: Good afternoon, Your Honor. The trust
21 is --

22 THE COURT: You need to make your appearance, every
23 one of you.

24 MR. NESSER: Isaac Nesser at Quinn Emanuel, counsel
25 for the ResCap Liquidating Trust which, by this action, is

1 seeking to liquidate assets of the bankruptcy estate for the
2 benefit of bankruptcy creditors by recovering for bankruptcy
3 settlement that this bankruptcy court reviewed and approved,
4 pursuant to a bankruptcy plan that preserved the specific
5 claims at issue here, that named UBS as a target of those
6 claims.

7 THE COURT: Okay. Look --

8 MR. NESSER: And that will require interpretation of
9 the plan.

10 THE COURT: Well, that's the -- the plan reserves
11 jurisdiction. Jurisdiction has to exist. You've heard my
12 questions --

13 MR. NESSER: Yeah.

14 THE COURT: -- regarding whether this plan has to be
15 interpreted and applied in order to adjudicate the claims
16 against UBS. Could you address that?

17 MR. NESSER: Absolutely, Your Honor. As I think
18 you've indicated, it is the case that resolution of this
19 adversary proceeding would require interpretation of the plan.

20 THE COURT: I know. I've raised questions.

21 MR. NESSER: That's our --

22 THE COURT: Don't take my questions as the answer.
23 Don't assume that.

24 MR. NESSER: I apologize, Your Honor.

25 THE COURT: I've raised questions because I have

1 questions. It may be that it doesn't, okay. So let me
2 just -- and I'll stop you there, because it -- when I work
3 through the analysis, faulty or otherwise, it didn't seem to me
4 that Count I of your complaints, I know we're only dealing with
5 one today, but the breach of the representations and warranties
6 is not going to require an interpretation of the plan. It's
7 Count II, the indemnification claim that does. So does Count I
8 of -- and I didn't open this complaint, in fact, this morning,
9 but in most of your complaints, it's Count I and Count II.
10 Count I is breach of reps and warranties; Count II is the
11 indemnification.

12 MR. NESSER: Your Honor, that is how the complaint is
13 set up. And I think our position is that the indemnification
14 claim clearly would require interpretation of the plan.

15 THE COURT: What about Count I though?

16 MR. NESSER: The breach of contract claim would also
17 require interpretation of the plan.

18 THE COURT: Why?

19 MR. NESSER: Because the damages that we are seeking
20 through that claim, in part, include the liabilities and losses
21 that we incurred pursuant to the settlement agreement that was
22 part of the plan. And so call of these questions concerning
23 what was settled, how it was settled, for what price it was
24 settled, how that settlement should be allocated among the
25 various correspondent lenders that we've sued, all of that

1 directly is going to require interpretation of the plan and the
2 settlement that underlies the plan.

3 THE COURT: Have you gone through the plan and can you
4 track for me now how, in your view, the answer is going to be
5 derived as to -- so if you assume that UBS sold defective loans
6 to RFC, how damages on a breach of representation warranty
7 claim or loss or damage on an indemnification claim is to be
8 determined?

9 MR. NESSER: Your Honor, I'm not prepared to do
10 that --

11 THE COURT: All right. That's fine.

12 MR. NESSER: -- now. And we're happy to present that
13 in a separate brief.

14 THE COURT: Fine.

15 MR. NESSER: If I can just, by way of updates, before
16 getting to the substance --

17 THE COURT: Sure.

18 MR. NESSER: -- of their argument, just a few things.
19 First, we heard counsel this morning discussing the ACE case in
20 the New York State court system. Literally two hours ago, the
21 New York Court of Appeals granted leave to appeal in that case.
22 So issues concerning coordination and making sure that we have
23 the same results in federal and state courts following
24 resolution of that appeal in the court of appeals won't be an
25 issue any longer.

1 THE COURT: Well, it may still be an issue, but
2 anyway.

3 MR. NESSER: Well, to the extent that the --

4 THE COURT: Fine. The Court of Appeals will speak to
5 it.

6 MR. NESSER: To the extent it is an issue of New York
7 State contract law, under Erie, presumably this case will be
8 bound by that, and that really would be the issue, of course, I
9 suppose, depending on how the New York Court of Appeals
10 resolves it.

11 Second thing we wanted to note is, in response to Your
12 Honor's questions, we were able at least to take a preliminary
13 look at the contract that underlies UBS's proofs of claim. And
14 Section 3.02 of that contract presents the same types of reps
15 and warranties as to the loans that were being sold that are
16 substantively the same reps and warranties that we are
17 proceeding on here with respect to, for example, issues such as
18 borrower fraud. And that's not surprising. Nobody buys a loan
19 without having some representation and warranty that the
20 borrower hasn't committed fraud in the course of disclosing his
21 income, in the course of disclosing whether the appraisal is
22 accurate or not, and in the course of disclosing whether he
23 intends to occupy the property.

24 And so it's not surprising and it, in fact, is the
25 case that the existence of representations and warranties is in

1 both cases; the extent to which those reps and warranties were
2 breached is going to be a common issue in the proof of claim.
3 And in our case, the methodologies by which this court is going
4 to have to determine whether the breaches -- the alleged
5 breaches and the proof of claim are the same methodologies that
6 are going to be discussed in our claim. It's issues such as
7 sampling presumably are going to be presented by their case,
8 right? Are they going to argue for sampling of the loans that
9 we sold them that they allege are defective? Are we going to
10 argue that sampling is an appropriate method of proof as to the
11 loans that we bought from them. And so it's going to be the
12 same issues, issues such as -- legal issues as well, such as
13 how do you prove causation in these cases. How do you allocate
14 damages in these cases?

15 THE COURT: Anyway, I just -- offhand, do you know how
16 many loans RFC bought from UBS, how many loans RFC sold to UBS?

17 MR. NESSER: I know that -- I believe that RFC
18 purchased -- the complaint alleges that RFC purchased at least
19 1,900 loans from UBS. I think the actual number is somewhat
20 higher than that.

21 THE COURT: Okay.

22 MR. NESSER: And we're prepared to provide more detail
23 pursuant to discussion yesterday. But certainly, there are
24 thousands of loans at issue in our case. It's not clear to me
25 how many loans are at issue in their proof of claim.

1 THE COURT: Okay.

2 Is UBS's counsel able to tell me how many loans you
3 sold RFC?

4 MR. DRYLEWSKI: Yes, Your Honor. According to Exhibit
5 F of the Fumerton declaration or opening brief, the proof of
6 claim submitted by UBS against RFC seeks indemnification for
7 about forty-five million dollars and change in loans.

8 THE COURT: Does it say how many loans were -- okay.

9 MR. DRYLEWSKI: I don't see a number of loans.

10 THE COURT: Because where I'm going with this is the
11 issue of setoff and recoupment --

12 MR. NESSER: Yeah, Your Honor --

13 THE COURT: -- whether that is going to be -- whether
14 arguments about setoff and recoupment support one court
15 adjudicating the claims and counterclaims.

16 I pride myself on timely adjudicating anything that
17 comes before me. Is it going to be a situation where UBS could
18 obtain a ruling from me in six months on its claims against the
19 estate, but it's going to take five years to get an
20 adjudication of the estate's -- the trust's claim against UBS?
21 And what happens in between, even though they arise from
22 different contracts which may have exactly the same terms that
23 are at issue. Shouldn't claims and counterclaims be resolved
24 at once so that setoff or recoupment can be determined?

25 MR. NESSER: Yes, Your Honor. And that's why

1 Congress, in enacting 157(b)(2), includes counterclaims as one
2 of the statutorily defined core proceedings, because the
3 purpose of proceeding and the benefit of proceeding on a
4 counterclaim basis, is precisely because of issues such as
5 setoff and recoupment, precisely because there are issues of
6 efficiencies as between the two actions. And it's not just
7 setoff and recoupment, Your Honor, but also, as I indicated and
8 as we discussed on Tuesday in the initial pre-trial
9 conferences, there are going to be common legal questions
10 across our case and the proof of claim. There are going to be
11 common legal issues on damages, on the legal elements of
12 indemnity, perhaps on defenses to indemnity, as to allocation,
13 as to all of these things. And it's going to be the same
14 questions. And there's simply no reason to have two courts,
15 one in federal court and one in state court, adjudicating those
16 issues duplicatively. Number 2, it would defeat the purpose of
17 having the cases in one -- it would also --

18 THE COURT: Can I ask --

19 MR. NESSER: -- lead to inconsistent adjudications
20 and -- yeah.

21 THE COURT: May I ask you this? Whether any of the
22 judges in Minnesota who denied a motion to transfer addressed
23 the issue of whether resolution of the indemnity claims, for
24 example, requires an interpretation of the confirmed Chapter 11
25 plan.

1 MR. NESSER: They did not discuss that precise issue.

2 THE COURT: Was it raised with them?

3 MR. NESSER: No.

4 THE COURT: I don't know. Your firm --

5 MR. NESSER: Yes.

6 THE COURT: Did you file the cases originally?

7 MR. NESSER: We did not file the cases originally. We
8 did file the transfer motions.

9 THE COURT: Okay.

10 MR. NESSER: And what we argued in the transfer
11 motions was that this Court's familiarity with and
12 understanding of the terms of the settlement and the bankruptcy
13 plan, as well as this Court's retention of jurisdiction, were
14 factors, among others, that suggested the cases should be tried
15 here.

16 THE COURT: All right.

17 MR. NESSER: But the precise issue of interpretation
18 of the plan was not presented.

19 THE COURT: Okay.

20 MR. NESSER: Your Honor, also by way of update, asked
21 counsel about where things stand in the New York State Court.
22 And what we did -- because this was first raised, frankly, in
23 counsel's reply brief, we took, over the last couple --

24 THE COURT: You may well have the burden. I mean, the
25 footnote --

1 MR. NESSER: We don't believe --

2 THE COURT: -- in Parmalat suggests you have the
3 burden.

4 MR. NESSER: We don't believe we have the burden, but
5 we, of course, understand that that's an open issue in the
6 Second Circuit. And so we took a look, over the last couple of
7 days preliminarily at some statistics on the RMBS cases that
8 are pending in Part 60. And again, it's preliminary. I
9 can -- we can include this in our brief or I can --

10 THE COURT: Why don't you give -- do you have a chart?
11 Give it to --

12 MR. NESSER: Sure.

13 THE COURT: -- your opposing counsel.

14 MR. NESSER: And Your Honor, we want to be clear in
15 presenting this -- and I'm happy to walk through it briefly,
16 but we want to be clear in presenting this that what happened
17 in the New York State Court system was in May of 2013 there was
18 an administrative order entered that had the effect of dumping
19 into Part 60 literally dozens and dozens and dozens of RMBS
20 actions. So all of a sudden, the justice woke up and was faced
21 with this fountain of RMBS cases. We presented some statistics
22 in the hand-up, and I can walk through what we have here just
23 in terms of what the posture of those cases are and how they've
24 been proceeding.

25 The first two pages of the hand-up just present the

1 time to adjudicate -- the time from the filing of the cases
2 which, in most instances, those cases were filed with other
3 judges, not Part 60.

4 THE COURT: Right.

5 MR. NESSER: The time from the commencement of those
6 cases until the disposition of the current motion to dismiss,
7 if there has been a disposition. And then the second two
8 pages, for the same set of cases, presents the amount of time
9 that the most recent motion to dismiss --

10 THE COURT: Has Justice Friedman permitted discovery
11 or directed that discovery go forward while motions to dismiss
12 are pending?

13 MR. NESSER: As I understand it, and we've not had the
14 ability to determine this, but to a certain -- but as I
15 understand it, there are some cases in which the prior justice
16 had entered a stay of discovery and Justice Friedman has
17 permitted that stay to remain in place. There are other cases
18 in which, I believe, discovery is proceeding.

19 And again, much of what's presented on this chart,
20 Your Honor -- I just want to be emphatic about this, I hope for
21 reasons that are clear. Much of what's presented in this chart
22 has to do with things that happened prior to the administrative
23 order. But the facts are the facts and the statistics are the
24 statistics. And what they show --

25 THE COURT: So what's the total number of cases she

1 hasn't filed?

2 MR. NESSER: -- is that there's a very significant
3 backlog.

4 Your Honor what we did on this chart, in answer to
5 your question, is we looked at all the cases that the New York
6 State docketing system shows as having been -- as pending with
7 Justice Friedman --

8 THE COURT: Right.

9 MR. NESSER: -- to the extent they were filed on or
10 after June 24, 2011. I believe there's something in the range
11 of seventy of them -- between sixty and seventy of them just on
12 this chart. There may well be others that we're not capturing
13 on this list. And these are all RMBS cases as best we've been
14 able to determine.

15 THE COURT: Okay.

16 MR. NESSER: I would point out, Your Honor, that by
17 comparison to some of the numbers on this chart, it doesn't
18 need a huge amount of emphasis that this Court was able to
19 resolve the entire bankruptcy in just over two years. And this
20 Court, on Tuesday, indicated an intention to resolve these
21 fifteen adversary proceedings on a very quick timetable. And
22 so the timely adjudication issue, to the extent we're talking
23 about backlog, we think we've demonstrated that there's a
24 pretty significant backlog in the New York State Court. And to
25 the extent we're talking about a comparison of what this Court

1 might be able to do in light of its head start and
2 understanding of the issues, in light of its ability to
3 coordinate versus what might be available in the state court is
4 clear.

5 THE COURT: So what I'm going to -- since I'm going to
6 have an additional filing from both sides, in fairness to UBS,
7 since -- if we assume for purposes of discussion that the trust
8 has the burden, you've made arguments on timely adjudication,
9 but this is the first real focus on what the backlog in the
10 commercial division is. I'm going to permit both sides to
11 address it in the same supplemental filing. So I want to be
12 sure that UBS has -- and if they have additional information
13 they want to submit, that's fine. Okay?

14 MR. NESSER: And Your Honor, we appreciate that
15 opportunity.

16 THE COURT: Okay.

17 MR. NESSER: On the issue of core jurisdiction, which
18 was discussed with counsel, we think there's core jurisdiction
19 here for at least three different reasons. First, under
20 157(b)(2)(C), this adversary proceeding is a counterclaim to
21 UBS's proof of claim. There's no dispute there's a proof of
22 claim. There's no dispute that the parties are the same and --

23 THE COURT: So why did they file in state court?

24 MR. NESSER: Your Honor, unfortunately, it's the same
25 answer I gave you yesterday, which is that I don't know. These

1 cases were filed by prior counsel representing a prior entity.

2 THE COURT: One of the cases yesterday that was
3 discussed was a case that was filed in Minnesota and then
4 voluntarily dismissed when the case was filed here. Why
5 haven't you just simply filed a new case here and just continue
6 your action in the state court? I remember when I was in
7 practice, people used to file a protective action. You'd file
8 an action in state court, then you'd file an action in federal
9 court. Assuming you had jurisdiction in federal court, that
10 was the one you were going to proceed with.

11 MR. NESSER: Your Honor, we've had various defendants
12 in these cases make statute of limitations arguments, and they
13 may well have been part of what was under discussion.

14 THE COURT: Have you focused on this case? Is
15 there -- well, I know UBS is raising a statute of limitations
16 issue.

17 MR. NESSER: I'm sorry, Your Honor?

18 THE COURT: Somebody unnecessarily complicated the
19 issues before me by filing an action in state court. That's
20 fine. I'll decide the issue. But it's an issue I probably
21 didn't have to get to, although I suppose you could still raise
22 a mandatory permissive abstention. There are some decisions
23 that don't require that an action be pending in state court.
24 Some decisions require that there be an action pending in state
25 court. So I suppose if you had filed a protective action, I'd

1 still maybe have the same issue. But I just -- it's
2 complicated the circumstances. I understand your firm didn't
3 do it.

4 MR. NESSER: It is complicated. And what we've tried
5 to do --

6 THE COURT: So now you're living with twenty-seven
7 cases in district court in Minneapolis between -- before ten
8 different judges, fifteen cases before me, one that's been
9 sitting in the district court to see whether it's going to get
10 transferred here, this motion to remand. There probably will
11 be some more.

12 MR. NESSER: You're preaching to the choir, Your
13 Honor.

14 What we've tried to do, Your Honor -- all I can say is
15 that what we've tried to do, in as aggressive a method as we've
16 been able to, is to get all the cases in one place, and that's
17 why we moved to remove this -- that's why we removed this
18 action -- that's why in the same time period we removed the
19 action; we moved to transfer the cases from Minnesota.

20 While I'm talking about that, I guess I should mention
21 counsel has this argument that we were forum shopping to try to
22 get out from under ACE. That was not at all what was going on.
23 We were trying to -- we transferred fifty-seven -- we
24 transferred fifty-eight cases -- we tried to transfer fifty-
25 eight cases to this Court at the same time that we were trying

1 to remove that case, so it was --

2 THE COURT: So I'm wrong at twenty-seven. It's fifty-
3 eight cases?

4 MR. NESSER: I think -- I may have misspoken. It may
5 be -- anyway, the numbers -- I think the precise numbers aren't
6 the point. The point is that this was part of a single attempt
7 to get everything in one place in which we filed a massive
8 amount of paper in this state and also in Minnesota. The
9 notion that that massive campaign was somehow motivated by an
10 attempt to get out from under ACE is simply not true. And in
11 any event, ACE would only be relevant to the contract claims,
12 not to the indemnity claims. And as I've indicated, ACE is --

13 THE COURT: We'll deal with that later.

14 MR. NESSER: -- is now being reconsidered in the court
15 of appeals.

16 THE COURT: Okay. Any --

17 MR. NESSER: But turning back to the counterclaim
18 issue, because this is a really simple way out, Your Honor, and
19 we think this is really the easiest, although some of the
20 issues you've raised may be even easier. But the language of
21 157(b)(2)(C) could not be clearer in stating
22 that -- unambiguously, that a counterclaim is a core
23 proceeding.

24 THE COURT: Yes, but Arkison -- if you dissect the
25 language of Arkison, it's ambiguous, in my view -- it's unclear

1 to me -- I won't say ambiguous -- it's unclear to me. At two
2 points, Justice Thomas talks about treating the claims as if
3 they are related-to, noncore, and another point, there's
4 language -- because where it refers to -- in the cases where an
5 Article I judge can't enter -- a Stern-type claim that you
6 can't enter a final order or judgment, this subsection of 157
7 is unconstitutional. Then you look to see whether you can do
8 it under 157(c)(1).

9 MR. NESSER: If I can address that argument, Your
10 Honor --

11 THE COURT: Go ahead.

12 MR. NESSER: Stern clearly held that the counterclaim
13 at issue there, even though it was a "Stern counterclaim",
14 Stern clearly held that that counterclaim was a core
15 proceeding. That was a holding in Stern.

16 THE COURT: I know.

17 MR. NESSER: And so there may well --

18 THE COURT: Now we get to Arkison.

19 MR. NESSER: Even if there -- and that's why I'm
20 stressing that was a holding in Stern. And so any suggestive
21 language that Your Honor may perceive in Justice Thomas's
22 opinion in Arkison is at most dicta and could not possibly have
23 overruled the holding in Stern. I won't belabor it beyond
24 that. I think Your Honor clearly understands those issues
25 likely better than I do.

1 But turning back again, if I can, to the counterclaim,
2 and I'll move off it very quickly, Federal Civil Procedure
3 13(B) is unambiguous that a counterclaim does not need to have
4 a relationship to the occurrences or transactions underlying
5 the primary claim, and so there's simply no relate -- there's
6 no need for there to be --

7 THE COURT: This is a commentary on Stern they have
8 not updated yet for Arkison, whether there's a difference
9 between permissive and compulsory counterclaims. We're not
10 going to go there now.

11 MR. NESSER: I won't go there, Your Honor.

12 And then, even if there were some obligation of an
13 overlap between the primary claim and the underlying claim, we
14 have that here for all the reasons that we've discussed. The
15 counterclaim and the -- the proof of claim and the adversary
16 proceeding involve the same legal issues and defenses and so
17 on. We concede, of course, that the loans are different, and
18 we concede, of course, that the title of the contract is
19 different.

20 THE COURT: I want to see whether the applicable
21 provisions of the contracts that are in dispute are the same or
22 different.

23 MR. NESSER: Your Honor, I said that there are three
24 reasons why we thought there's core jurisdiction here. Also,
25 under 157(b)(2)(O) and (b)(2)(A), this is a proceeding that

1 directly affects the administration of the estate and the
2 liquidation of the estate.

3 THE COURT: On that, I don't think you do so well
4 because the cases, as I read them, say if the only thing you're
5 talking about is adding money to the estate, that's not enough.

6 MR. NESSER: Well, Your Honor, but it's not -- that's
7 not all we're talking about here because what we're talking
8 about, as Your Honor asked, is also issues concerning the
9 interpretation and implementation of the plan and recoveries
10 of --

11 THE COURT: Well --

12 MR. NESSER: -- payments that --

13 THE COURT: -- I've raised that issue. I haven't
14 decided that issue.

15 MR. NESSER: And I didn't mean to suggest that you had
16 decided it. I --

17 THE COURT: So because what you really -- we haven't
18 talked about this, and I don't have much -- I have a 2 o'clock
19 trial today. This is addressed in the Skadden brief. The
20 narrowing of post-confirmation jurisdiction, because I start
21 with the issue, do I have subject matter jurisdiction --

22 MR. NESSER: Um-hum.

23 THE COURT: -- is the issue of whether, in a
24 liquidation case, you have to satisfy the close nexus test, and
25 if you do, have you satisfied it.

1 MR. NESSER: Your Honor, I'm happy to address that.
2 To begin with, the close nexus test does not apply, in our
3 view. We think that was necessarily the holding of Parmalat,
4 the 2011 decision, which held that a claim by a liquidating
5 trustee was a -- it was related-to jurisdiction there solely
6 for the reason that the liquidating trustee was trying to
7 obtain money for the benefit of creditors.

8 THE COURT: I have to go back and look at that in
9 Parmalat because I don't remember that.

10 MR. NESSER: I have that down as 639 F.3d 572 at 579.
11 As well -- that wasn't an explicit holding, but that was the
12 necessary conclusion of that decision.

13 THE COURT: There's this whole body of law about --

14 MR. NESSER: Absolutely.

15 THE COURT: -- narrowing a post-confirmation
16 jurisdiction, and I'd be reluctant to read a Second Circuit
17 case that sort of in passing doesn't really address the issue.

18 MR. NESSER: Well -- and Your Honor, the cases that we
19 cite in the brief made clear that the cases on narrowing of
20 jurisdiction post-confirmation, those cases relate to
21 reorganizations; they don't relate to liquidations.

22 THE COURT: Well, that's my question. Is there a
23 difference between liquidation cases and reorganization cases.

24 MR. NESSER: Yes, there is, Your Honor. And if you
25 look, for example, at the First Circuit's decision In re Boston

1 Regional Medical Center --

2 THE COURT: Which I've applied.

3 MR. NESSER: -- it was cited in Your Honor's decision
4 and was cited also in the Second Circuit decision, that court
5 goes on at length and explains why it is that there is such a
6 difference. As well, in In re DPH, the court observed that a
7 bankruptcy court's post-confirmation jurisdiction is actually
8 broader than it was pre-confirmation because the only thing
9 that the liquidating trustee is doing is liquidating the estate
10 of the assets. And so the notion that the close nexus applies
11 here -- the close nexus applies here we don't agree is the
12 case. Even if the close nexus test applied, arguendo, it's
13 satisfied here.

14 THE COURT: It's satisfied why?

15 MR. NESSER: It's satisfied because there are two
16 elements of that test, and we satisfied both of them. The
17 first element of that test is "whether the matter affects the
18 interpretation, implementation, consummation, execution or
19 administration of the confirmed plan", and we satisfied that
20 test for the reason that we discussed already.

21 The second element of the plan is -- of the close
22 nexus test is whether the plan provides for the retention of
23 jurisdiction over the dispute. And as we've discussed --

24 THE COURT: Okay. I'm satisfied --

25 MR. NESSER: -- the plan does that as --

1 THE COURT: Whether they agree or not, I'm satisfied
2 that the plan has a provision that would retain jurisdiction.
3 The focus for me is, is there jurisdiction. You can't create
4 jurisdiction.

5 MR. NESSER: Certainly, Your Honor. As well, on the
6 issue of the close nexus test, although we think the factors
7 we've already identified are sufficient to satisfy the test,
8 there's more here. There's more here because we have the UBS
9 proof of claim. We have the fact that the actual adversary
10 proceeding is going to require litigation of what happened in
11 the bankruptcy. Separate and apart from interpretation of the
12 plan, at the core of our indemnity claim, is the claim
13 regarding things that happened in the bankruptcy, the claims
14 that were settled, the terms on which they were settled, how
15 they were settled; all of that is going to require document
16 productions from the bankruptcy, litigation concerning things
17 that happened in the bankruptcy. And so that's a close nexus
18 as well on the facts.

19 THE COURT: All right. I'm going to have to cut you
20 off.

21 MR. NESSER: And if I can just make my one last point,
22 and it's a small one, but I do want to just slightly make note
23 of it. In addition to the proof of claim filed by UBS, there
24 are proofs of claim filed by seven or eight other banks in the
25 bankruptcy in which they assert claims for indemnification in

1 respect of some of the very same loans that we are suing UBS
2 for. And clearly, Your Honor, it's not a huge number of loans.
3 It's something like 268 loans, I think.

4 THE COURT: Does UBS's claim arise out of -- was UBS a
5 defendant in the FHFA cases before Judge Cote?

6 MR. DRYLEWSKI: Yes, it was, Your Honor.

7 THE COURT: And does the indemnification claim that
8 was filed here arise out of the FHFA cases before Judge Cote?

9 MR. NESSER: Yes, Your Honor.

10 THE COURT: All right.

11 MR. DRYLEWSKI: Your Honor, we don't know at this
12 time --

13 THE COURT: All right. That's fine.

14 MR. DRYLEWSKI: -- whether we had RFC loans at issue.
15 We can get back to you on that.

16 MR. NESSER: Actually, I should say I believe the
17 answer is yes.

18 THE COURT: Okay. All right. Let's agree on a
19 briefing schedule. I want one brief from each side. How much
20 time do you want?

21 MR. NESSER: Two weeks, Your Honor.

22 THE COURT: You really want to do that over the 4th of
23 July?

24 MR. NESSER: I don't.

25 THE COURT: Come on.

1 MR. NESSER: Thirty days. Your Honor, these are going
2 to be simultaneous briefs?

3 THE COURT: Yeah, simultaneous briefs.

4 MR. NESSER: I think thirty days is fine with us.

5 THE COURT: All right.

6 MR. DRYLEWSKI: We'd prefer to do it quicker than
7 thirty days.

8 THE COURT: Well, I'm going to set the thirty days. I
9 want the briefs within thirty days. I've raised a number of
10 issues that I want addressed.

11 MR. NESSER: Page limits?

12 THE COURT: Twenty-five pages. That doesn't count
13 attachments. I asked, for example, the contract language and
14 stuff like that.

15 MR. DRYLEWSKI: And this is limited solely, Your
16 Honor, to the issue of whether the indemnification claim here
17 in this action requires interpretation of the plan's terms?

18 THE COURT: No. I raised several questions. I raised
19 question -- order a transcript. I mean, I raised questions and
20 said I wanted to know whether, in the two forms of master
21 agreements that UBS supplied, one as a purchaser, one as a
22 seller, whether the provisions on reps and warranties and
23 indemnification are the same in those flip-side agreements --
24 flip-side meaning one purchaser, one seller -- such that the
25 same contract language is going to have to be interpreted and

1 applied in adjudicating the claims and counterclaims. That was
2 one set of questions. Get a transcript.

3 I mean, I think I tried to -- I don't want to go
4 by -- off the top of my head. I asked a series of questions.
5 I just want to do one filing -- simultaneous filing by each
6 side. Some of it, you'll have to put in a declaration just to
7 authenticate this is the master agreement on the buy side, this
8 is the master agreement on the sell side; not elaborate. And
9 then I asked for an analysis of whether the plan provisions
10 regarding the settlement of the RMBS claims require an
11 interpretation, an application of the plan in determining --
12 I'll say it -- this may not be the exact way I said it
13 before -- the amount of damages or recovery on either the
14 breach of rep and warranty claim or the indemnity claim. So I
15 hope that's clear enough.

16 MR. DRYLEWSKI: Yes, Your Honor. Thank you.

17 THE COURT: So order the transcript, and you can make
18 sure that you're being responsive.

19 So bear with me a second, okay?

20 I want those simultaneous briefs by 5 p.m. Friday,
21 July 25th. After receiving the briefs, I will review them and
22 decide whether I want to hear further argument, okay. And you
23 can indicate in your brief whether you're requesting argument.
24 I may or may not do it, but I'm more likely to have you come
25 back. And if you do, it will be not too long after the briefs

1 are filed. I try not to let things linger, okay? All right.

2 We're adjourned. Thank you very much.

3 IN UNISON: Thank you, Your Honor.

4 (Whereupon these proceedings were concluded at 1:02 PM)

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C E R T I F I C A T I O N

I, Aliza Chodoff, certify that the foregoing transcript is a true and accurate record of the proceedings.



ALIZA CHODOFF

AAERT Certified Electronic Transcriber CET**D-634

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Date: June 27, 2014